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A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy

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FLORIDA STATE UNIVERSITY LAW REVIEW

A HIGHER AUTHORITY: THE VIABILITY OF THIRD PARTY TORT ACTIONS AGAINST A RELIGIOUS INSTITUTION GROUNDED ON SEXUAL MISCONDUCT BY A MEMBER OF THE CLERGY

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A HIGHER AUTHORITY: THE VIABILITY OF THIRD PARTY TORT ACTIONS AGAINST A RELIGIOUS INSTITUTION GROUNDED ON SEXUAL MISCONDUCT BY A MEMBER OF THE CLERGY

JANNA SATZ NUGENT*

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I. INTRODUCTION

A. Historical Origin

Papal courts gained popularity in the Middle Ages as a major source of the Roman Church's power and wealth; and the Pope, as the head of the papal court, often decided cases in collaboration with a king, a duke, or an archbishop.[1] Ironically, early concerns over the papal court centered on the Pope's entanglement in the secular and political life of Europe. "[T]o think chiefly in legal, was to think chiefly in secular, terms,"[2] a practice ill-suited to Peter's successors. Increasingly, the Popes of the Middle Ages acted like kings and became entrenched in diplomatic, international relations. Efforts to reform the Church by improving ethical standards and "disengaging the clergy from their role as supporters of the State, ended, by a kind of helpless logic, in thrusting the Church far more deeply and completely into the secular world [and] . . . the Church became a secular

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* B.A. Haverford College, 1994; J.D. Florida State University, expected May 2003. Thank you to Professor Vinson and Bill, who managed to dredge through the "legaldegooky garbage" to offer valuable comments; to my friends and family, for their encouragement and faith; and to Steve, whose love makes roller coasters worth riding.

1. *See* PAUL JOHNSON, A HISTORY OF CHRISTIANITY 207 (1976).

2. *Id.*

world of its own."[3] Like many of the rival kingdoms in Europe, the Church and the State were bound for war.

The personal and political conflict between Thomas Becket (1118-1170) and King Henry II (1154-1189), one of the most competent of English kings, demonstrates early tensions between conflicting authorities. In the early years of King Henry II's reign, lawlessness ran rampant among members of the clergy; but clergymen were tried in the less severe legal system of the Church.[4] Hoping to rid his kingdom of this double standard, King Henry looked to his friend Thomas Becket, who had served England as a "seemingly complaisant chancellor."[5]

On June 2, 1162, King Henry secured the election of Becket as archbishop of Canterbury.[6] Henry hoped that he and Becket might end the conflict created by the existence of two legal systems.[7] But as archbishop, Becket found in God a higher authority than the king.[8] When a Worcestershire cleric raped a young girl and murdered her father:

> Becket had [him] branded. This was open to four objections: it was inadequate; it was a sentence unknown to canon law; it was, indeed, a usurpation of royal authority; and it flatly contradicted Becket's own argument that clerks should not suffer mutilation, normal in royal courts, 'lest in man the image of God be deformed.'[9]

King Henry responded by enacting the Constitutions of Clarendon, which limited the power of the Church in a number of ways, including the subjection of clergy to civil courts and the weakening of the Church's power of excommunication.[10] As a servant to God, no longer to the king, Becket resisted these changes. Tensions grew between Church and State, and King Henry, temporarily enraged, called for Becket's death.[11] Norman knights carried out the King's request, and "Henry was forced to abandon the Constitutions of Clarendon and to do public penance at Becket's grave."[12] Despite the apparent victory for the Church, the King of England, rather uneventfully, continued his control over ecclesiastical affairs.[13]

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3. *Id.*
4. *See id.* at 208 ("Perhaps one in fifty people could make some claim to be considered in orders. And of these about one in six could expect to get into trouble with the law.").
5. WILLISON WALKER ET AL., A HISTORY OF THE CHRISTIAN CHURCH 367 (1985).
6. *Id.*
7. *See* JOHNSON, *supra* note 1, at 207.
8. *See id.* at 209.
9. *Id.*
10. WALKER ET AL., *supra* note 5, at 367.
11. *See id.* at 368.
12. *Id.*
13. *Id.*

B. Current Crisis

Church and State have collided once again; and once again, the Church has been entirely too forgiving under the legal standards of the State. In June 2001, Cardinal Bernard F. Law admitted that in 1984 he appointed Reverend John J. Geoghan parochial vicar of a suburban parish two months after learning that Geoghan allegedly molested seven boys.[14] Law's admission prompted investigative reports—reminiscent of Woodward and Bernstein's uncovering of Watergate—by editor Walter V. Robinson and reporters Matt Carroll, Sacha Pfeiffer, and Michael Rezendes of *The Boston Globe*'s "Spotlight Team."[15] The Spotlight Team gained access to confidential documents and discovered written proof that the archdiocese had known about Geoghan's abuse of children for decades.[16] In over 300 newspaper articles on clergy sexual abuse, the *Globe* reported that cardinals and "bishops had known about [numerous incidents of] abuse [by members of the clergy] but failed to remove the priests from their jobs . . . [and] that over the past decade the Archdiocese of Boston had secretly settled cases in which at least seventy priests had been accused of sexual abuse."[17] But the problem was much larger than events in Boston. From January to April 2002, 176 priests across the country were removed from their positions, and bishops in the United States, Poland, and Ireland resigned.[18]

Reports of abuse and of the Church's failure to protect minors led infuriated Catholics to withhold contributions to the Church and demand reform.[19] Some state legislators amended mandatory reporting laws to include clergy among the list of mandatory reporters, and

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14. THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH, at ix (2002).

15. *See id.*

16. *Id.*

17. *Id.* For a full text of Cardinal Law's June 5th and June 7th depositions, detailing the Cardinal's appointment of known pedophiles to positions within the Church, see Pam Belluck, *Cardinal Told How His Policy Shielded Priests*, N.Y. TIMES, Aug. 13, 2002, *available at* http://www.nytimes.com/2002/08/14/national/14CARD.html (last visited Jan. 7, 2003) (on file with author); *see also* Fred Bayles, *Abuse Victims Flock to Lawyers*, USA TODAY, July 30, 2002, *available at* http://www.usatoday.com/news/religion/2002-07-30-abuse-litigate_x.html (last visited Jan. 7, 2003) ("Attorneys who defend the church say the swift, quiet settlements of the past are now impossible with the flood of cases and news reports of church coverups."); Margaret Cronin Fisk, *Church's New Trial*, NAT'L L.J., May 10, 2002, *available at* http://www.law.com (last visited Nov. 25, 2002) (explaining that previously settled claims are resurfacing in litigation where it is alleged that settlements were fraudulently induced, "the church failed to live up to agreements to remove the priests from the active ministry," or the Church falsely "testified that there were no other victims").

18. THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *supra* note 14, at 4.

19. *Id.*

prosecutors began issuing arrest warrants for priests.[20] Cardinals of the United States and the leadership of the United States Conference of Catholic Bishops (the "USCCB") traveled to the Vatican in April for a meeting with the Prefects of the Roman Congregations, where Pope John Paul II issued a statement recognizing that the sexual abuse of minors "is by every standard wrong and rightly considered a crime by society [and that] it is also an appalling sin in the eyes of God."[21] As a result of this meeting, on June 14, 2002, the USCCB adopted its first national policy on dealing with sexual abuse.[22]

The *Charter for the Protection of Children and Young People* states that "[t]here is no place in the priesthood or religious life for those who would harm the young."[23] But this statement comes more than a decade too late, and the Church is now called to defend itself against hundreds of lawsuits in which church victims are filing tort claims ranging from breach of fiduciary duty to negligent hiring, supervision, and retention. To fight this war, the Church has replaced its once-trusted weapon of excommunication with a more modern shield: the First Amendment. Behind this shield, battles are being won and lost.

In examining third party tort actions against the Church, Part II next surveys the causes of action asserted to hold a religious organization liable for the sexual misconduct of a member of its clergy.[24]

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20. *See, e.g.,* MASS. GEN. LAWS ch. 119, § 51A (2002). For further discussion, see *infra* Part V of this Article.

21. Pope John Paul II, Address to the Cardinals of the United States and Conference Officers (Apr. 23, 2002), *available at* http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_en.html (last visited Jan. 7, 2003).

22. United States Conference of Catholic Bishops, Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests, Deacons, or Other Church Personnel (June 14, 2002), *available at* http://www.usccb.org/bishops/norms (last visited Nov. 25, 2002).

23. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN & YOUNG PEOPLE art. 5 (2002) (setting procedures for investigating alleged abuse cases and mandating the immediate removal of any cleric who has sexually abused a young person).

24. For purposes of this Comment, "clergy" or "cleric" may refer to an ordained or licensed priest, rabbi, or minister of any religious organization or denomination, but it does not include lay persons who are employed by the religious organization. Unless otherwise stated, the term "Church" is used loosely throughout this Comment and refers to any religious organization or denomination. While the Roman Catholic Church is the subject of recent controversy and is a named defendant in many of the cases discussed in this Comment, no religious organization is immune from the potential for sexual misconduct. *See, e.g.,* Alan Cooperman, *Sexual Abuse Scandal Hits Orthodox Jews*, WASH. POST, June 29, 2002, at A2 (Jewish synagogues have not faced "anything like the tidal wave of criminal charges and civil lawsuits, involving hundreds of priests, that have hit the Catholic Church" because, unlike priests, "rabbis are hired and fired by the boards of directors of individual synagogues. 'An offender could conceivably be dismissed by one congregation and get a job in another one, but there is no superior rabbi in a position to shift an offender from here to there.'"); Michael Paulson, *All Faiths Question Handling of Abuse: Debate*

Part III focuses on the viability of one of those causes of action—negligent hiring, supervision and retention—under First Amendment analysis. Part IV discusses the Florida Supreme Court's decisions in *Malicki v. Doe* and *Doe v. Evans*, where the court held that the First Amendment did not bar a claim against a religious institution, at least at the initial pleading stage, for harm caused by the sexual misconduct of a cleric.[25] Finally, this Comment identifies common issues faced by those who represent victims of clergy sexual misconduct and explores potential avenues to reconciling church doctrine with justice.

II. THEORIES OF CIVIL LIABILITY

Over the last few years, allegations of clergy sexual misconduct have been asserted in greater numbers, and it has become increasingly common for plaintiffs to sue religious organizations for their clerics' misconduct. Not coincidentally, courts increasingly hold religious organizations liable for clerical torts. Theories of liability—including imputed or direct negligence, breach of a fiduciary duty, respondeat superior or agency, intentional infliction of emotional distress, clergy malpractice, and negligent hiring, supervision, and retention—have been received by the courts with varying degrees of success. A sampling of these causes of action is discussed below.

A. *Breach of Fiduciary Duty*

Some state courts have recognized a cause of action against the Church for breach of fiduciary duty with respect to sexual misconduct of clergy.[26] To recognize this cause of action, a court must first find the presence of a fiduciary relationship between the Church hierarchy and the victim of abuse. Under section 874 of the *Second Restatement of Torts*, "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."[27]

Over Celibacy as Factor is Rancorous, BOSTON GLOBE, Mar. 13, 2002, at A1 (discussing instances of clergy sexual abuse among a variety of religious institutions).

25. Malicki v. Doe, 814 So. 2d 347, 365 (Fla. 2002); Doe v. Evans, 814 So. 2d 370, 377 (Fla. 2002).

26. Examples of cases recognizing a cause of action for breach of fiduciary duty include *Moses v. Diocese of Colorado*, 863 P.2d 310, 322 (Colo. 1993); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. 1989) (holding that a priest may be held liable for breach of fiduciary duty if he abuses his role as a counselor); and *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988) (finding that a priest who commits sexual misconduct in his role as a marriage counselor can be held liable for breach of fiduciary duty). Yet similar causes of action have been denied in *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 912 (Neb. 1993) and *Schmidt v. Bishop*, 779 F. Supp. 321, 325-26 (S.D.N.Y. 1991).

27. RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1979).

Fiduciary relationships are "founded upon trust or confidence reposed by one person in the integrity and fidelity of another."[28] While not every clergy-parishioner relationship is a fiduciary relationship, many give rise to fiduciary duties because of the parishioner's dependence on, and faith in, the Church.[29]

Florida courts are among the state courts that recognize a cause of action for breach of a fiduciary duty against a religious institution or members of the clergy,[30] and a cleric "who commits a breach of his duty . . . is guilty of tortious conduct to the person for whom he should act."[31] Fiduciary duties may be the product of personal, moral, or social relations; "liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary."[32] For example, the Florida Supreme Court has held that a church that promotes its clergy as qualified marriage counselors has a fiduciary duty to its "counselees," despite the fact that most parishioners do not contract with the Church prior to receipt of counseling.[33] Because liability is based on factual distinctions rather than legal distinctions, juries—not judges—decide: (1) whether a fiduciary relationship exists between the plaintiff-parishioner and the defendant-clergy, and (2) whether the defendant breached his or her fiduciary duty.[34] Jury instructions that properly and simply define the characteristics of a fiduciary relationship are therefore essential.

In *Moses v. Diocese of Colorado*, the Supreme Court of Colorado agreed that the existence of a fiduciary relationship is a question of fact for the jury and held that the trial court had "properly instructed [the jury] on the requisite elements of a fiduciary relationship."[35] The trial court had asked jurors to evaluate the level of trust that the parishioner placed in the clergy-defendants; whether the trust was justified; whether the defendants knew or should have known that the parishioner relied on them to act in her best interest; whether the defendants "invited, accepted, or acquiesced in" the parishioner's trust; and whether the defendants attempted to protect the parishioner's interests.[36] The high court upheld the jury's finding of a fiduciary relationship and affirmed the trial court's holding that the Diocese of Colorado and the defendant bishop breached their duties "to deal

28. Penato v. George, 383 N.Y.S.2d 900, 904 (N.Y. App. Div. 1976).

29. *Moses*, 863 P.2d at 322.

30. *See, e.g.,* Doe v. Evans, 814 So. 2d 370, 376 (Fla. 2002); Shealey v. Masters, 821 So. 2d 342, 345 (Fla. 4th DCA 2002); Palafrugell Holdings, Inc. v. Cassel, 825 So. 2d 937, 940 (Fla. 3d DCA 2001).

31. RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979).

32. *Id.*

33. *Evans*, 814 So. 2d at 375.

34. *Id.*

35. 863 P.2d 310, 322 (Colo. 1993).

36. *Id.* at n.14.

'with utmost good faith and solely for the benefit' of the dependent party."[37] In reaching this conclusion, the court never addressed church doctrine nor relied on a layperson's definition of reasonableness.

Yet some courts have been unwilling to recognize this action for breach of fiduciary duty because the inquiry would present "constitutional difficulties" in defining the standard of care for a clergyman.[38] In *H.R.B. v. J.L.G.*, for example, the Missouri Court of Appeals identified a fiduciary relationship similar to the one discussed in *Moses* but refused to recognize a cause of action for breach of fiduciary duties against the defendant priest, archbishop, and Church of the Immaculate Conception School and Parish.[39] Although it conceded that the priest's sexual misconduct was not motivated by religious beliefs, the court somehow concluded that an inquiry into the religious aspects of the relationship between the Church authorities and the plaintiff parishioner was constitutionally improper.[40]

Beyond the bond shared between a parent and child, it is difficult to imagine a more sacred relationship than the one shared by a faithful parishioner and his or her church. Even the term "Father," as used by members of the clergy, invites trust and lulls loyal followers into feeling safe. This relationship must be guarded at all costs, and the Church hierarchy should be liable for failing to protect it.

B. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is a relatively new cause of action that has slowly gained recognition in state courts. Perhaps one reason for this slow pace is the potential for abuse that haunts a cause of action based on emotional rather than physical injuries. Nevertheless, modern science has provided courts—and more importantly, juries—with greater understanding of the human mind. Americans have become sensitized to the reality of psychological trauma, and the judicial system has acknowledged that legitimate claims for mental suffering exist.

The Florida Supreme Court, for example, first recognized the tort of intentional infliction of emotional distress in 1985 in *Metropolitan Life Insurance Co. v. McCarson*.[41] Two years later, in *Dependable Life Insurance Co. v. Harris*, the court identified the four elements re-

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37. *Id.* at 323 (quoting Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988)).
38. Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).
39. 913 S.W.2d 92, 98-99 (Mo. Ct. App. 1995).
40. *Id.* at 99. *But see* Doe v. Evans, 814 So. 2d 370, 376 (Fla. 2002) (holding that Doe's breach of fiduciary duty claim was not barred by the First Amendment, as the court is not being called upon to interpret ecclesiastical doctrine, and the "claim is governed by neutral tort law principles of general application").
41. 467 So. 2d 277, 278 (Fla. 1985).

quired to establish a cause of action for intentional infliction of emotional distress: (1) the defendant must have engaged in the deliberate or reckless infliction of mental suffering;[42] (2) the conduct must be outrageous; (3) the conduct must have caused the emotional distress; and (4) the distress must be severe.[43] In helping to define the terms "deliberate," "reckless," and "outrageous," the Fifth District Court of Appeal explained that the defendant had to act with purpose or recklessness, meaning that the defendant knew or should have known that the alleged actions would cause severe distress, and the defendant's behavior must have been conduct that any reasonable person would call indecent or intolerable.[44] Combined, these elements form a high standard designed to safeguard against fraudulent claims and to reflect the evolution of public opinion.

In stating a cause of action for intentional infliction of emotional distress against a religious institution, a plaintiff must allege active conduct by the Church that directly caused his or her severe distress; it is not enough to allege the sexual misconduct of a cleric.[45] For example, in *Elders*, the Third District Court of Appeal affirmed the trial court's dismissal of a claim for intentional infliction of emotional distress against the Florida Conference, Saint John's on the Lake United Methodist Church, and the District Superintendent of the Methodist Church.[46] The court explained that "the plaintiffs' allegations boil[ed] down to a claim of negligent failure to supervise Pastor Rivers[, which was] legally insufficient to establish a claim" based on outrageous conduct.[47]

Few plaintiffs, if any, have been successful in imposing liability on a religious institution for the intentional infliction of emotional distress because it is difficult to prove that the Church caused the plaintiff's distress by taking actions separate and distinct from the cleric's sexual misconduct and to prove that the Church's actions were "out-

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42. *See* Williams v. City of Minneola, 619 So. 2d 983, 987 n.2 (Fla. 5th DCA 1993) ("Gross negligence does not meet the standard for an award of punitive damages, . . . and, thus, certainly cannot meet the standard to establish the tort of outrageous and reckless conduct."). *But see* Champion v. Gray, 478 So. 2d 17, 18 (Fla. 1985) (recognizing a cause of action for negligent infliction of emotional distress under limited circumstances when there is "death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person").

43. Dependable Life Ins. Co. v. Harris, 510 So. 2d 985, 986 (Fla. 5th DCA 1987) (citation omitted).

44. *See* Williams v. City of Minneola, 575 So. 2d 683, 690-91 (Fla. 5th DCA 1991); *see also Metro. Life*, 467 So. 2d at 278-79 (explaining that the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency").

45. *See* Elders v. United Methodist Church, 793 So. 2d 1038, 1042 (Fla. 3d DCA 2001).

46. *Id.*

47. *Id.*

rageous." The *Boston Globe*'s investigative reporting on clergy sexual abuse educated the public about a scandal that

> seemed almost too horrible to be true. The reports showed that members of the Church hierarchy—including Cardinal Bernard F. Law of Boston, the most influential American Catholic prelate in the Vatican—were not only aware of the abuse but had gone to enormous lengths to hide the scandal from public view . . . .
>
> Most shocking to everyday Catholics, and most damaging to the Church, was the incontrovertible evidence that Cardinal Law and other leaders of his archdiocese had engaged in such a massive cover-up. Rather than protect its most vulnerable members, the Church had been putting them in harm's way.[48]

Unlike *Elders*, where allegations against the Church defendants were founded on the Church's failure to act, the *Boston Globe*'s account of Cardinal Law's behavior describes outrageous conduct, distinct from the sexual misconduct of Reverend Geoghan, that purposefully and recklessly caused the severe distress experienced by hundreds of victims of sexual abuse. These allegations would clearly state a cause of action for the intentional infliction of emotional distress.

C. Clergy Malpractice

The term *malpractice* refers to "a professional's improper or immoral conduct done either intentionally or through carelessness or ignorance."[49] It is often used to denote a physician's or lawyer's "unskillful performance of duties resulting from such person's professional relationship with patients or clients."[50] Unlike an intentional tort or ordinary negligence—which is actionable regardless of a person's profession—malpractice, by definition, is "the breach of a professional duty unique to that profession."[51] Thus, while the Church may be liable for an intentional tort or ordinary negligence, most courts have not recognized clergy malpractice because it calls for setting a standard for the duties of a clergyman.[52] And while courts greatly disagree on whether claims for torts like negligent hiring are

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48. THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *supra* note 14, at 3.

49. BARRON'S LAW DICTIONARY 303 (1996).

50. *Id.*

51. Hester v. Barnett, 723 S.W.2d 544, 551 (Mo. Ct. App. 1987).

52. *See, e.g.,* Dausch v. Ryske, 52 F.3d 1425, 1428 (7th Cir. 1994) (stating that the plaintiff's claims could be heard under traditional professional negligence claims and declining to recognize a cause of action for clergy malpractice); Destefano v. Grabrian, 763 P.2d 275, 285 (Colo. 1988) (en banc) ("We do not recognize the claim of 'clergy malpractice.'"); Leary v. Geoghan, 2000 WL 1473579, at *2 (Mass. Super. 2000) ("[I]t is safe to say that there is no such thing as 'clergy malpractice' in Massachusetts, or most other places."); *Hester*, 723 S.W.2d at 550 ("[M]inisterial malpractice is a tort not known in Missouri law."); Byrd v. Faber, 565 N.E.2d 584, 587 (Ohio 1991) ("[T]here is no basis for recognizing [the] claim for clergy malpractice.").

barred by the First Amendment, they seem to agree that the states, through their judicial systems, may not set such a standard.[53]

The court's rejection of the plaintiff's claim for clergy malpractice in *Schmidt v. Bishop* is typical.[54] In *Schmidt*, Christine Schmidt claimed that Reverend Joseph Bishop, a pastor at the Rye Presbyterian Church, sexually abused her under the auspices of providing family counseling when she was twelve years old.[55] The court acknowledged that the alleged facts stated a cause of action for battery, but then explained that Ms. Schmidt had to rely on alternative causes of action since the statute of limitations had run on her claim for an intentional tort-like battery.[56] Malpractice was one of the many alternatives pleaded in the complaint.

According to the court, Ms. Schmidt "deliberately avoided asserting that the case involve[d] *clergy* malpractice, but rather style[d] [the] claim artfully as one for malpractice by a 'youth worker and counselor.'"[57] One reason Ms. Schmidt attempted to fit her claim into the category of counselor malpractice may have been because the first and most cited case on clergy malpractice, *Nally v. Grace Community Church of the Valley*, left open the question of whether the First Amendment barred a claim of clergy malpractice for negligent counseling.[58] Moreover, asserting a more established cause of action

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53. *See* Paul A. Clark, *Malpractice After* F.G. v. MacDonell *and* Sanders v. Casa View Baptist Church, 22 AM. J. TRIAL ADVOC. 229, 230 (1998) ("Defining [standards for clergy malpractice] forces the court to investigate and review the skill, training, and standards required of clergy members in different religions, denominations, and sects. Undertaking such a task causes courts to become heavily entangled in religious doctrine and practice."). For further commentary on clergy malpractice and the First Amendment, see generally Ben Zion Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V. L. REV. 47 (1981); Samuel E. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163 (1981); C. Eric Funston, Comment, *Made out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507 (1983).

54. Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991).

55. *Id.* at 324.

56. *Id.* New York has not adopted an extended statute of limitations ("SOL") for sexual abuse or tolling provisions for delayed realization cases. If the abuse is treated as an intentional tort, New York's SOL is one year. N.Y. CIVIL PRAC. LAW § 215 (McKinney 2002). An action based in negligence, rather than criminal conduct, has a SOL of three years. *Id.* § 214. Other states, like Florida and Massachusetts, have adopted the delayed discovery doctrine. *See* Herndon v. Graham, 767 So. 2d 1179, 1181 (Fla. 2000) (stating that the SOL does not begin to accrue until the victim is aware that the abuse occurred and that accrual avoids the seven-year statute of repose); MASS. GEN. LAWS ch. 260, § 4C (2000) (setting the SOL for sexual abuse of a minor at three years from the time of the alleged acts or "within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act").

57. *Schmidt*, 779 F. Supp. at 326.

58. 763 P.2d 948, 960 (Cal. 1988) (addressing several claims by parents against a church and its pastors for the wrongful death of a son who committed suicide after counseling by the pastors).

for malpractice by a youth worker and counselor was not a complete stretch. Indeed, "[t]he duties of a clergyman most nearly approximate to an existent professional practice, and hence most accountable to minimum professional standards, . . . include that of spiritual counseling."[59] The Missouri Court of Appeals, nevertheless, took the position that despite Ms. Schmidt's broad use of the term "malpractice," the real issue had to be *clergy* malpractice; otherwise, by analogy, "a medical malpractice action against a surgeon might well be characterized as one for 'counseling malpractice,' since surgeons often engage in pre- and post-operative 'counseling.'"[60] After calling the horse a "horse," so to speak, the court addressed the viability of clergy malpractice theories.

Typically, clergy malpractice claims have been denied either because they fail to allege distinct facts pertinent to the clergy-parishioner relationship that are not already actionable,[61] or because the court is concerned that the alleged conduct is within the purview of the First Amendment. In *Schmidt*, the court stated that "[i]t would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric . . . performed within the level of expertise expected of a similar professional . . . ."[62] To measure a cleric's conduct, for example, the court would have to create a hypothetical, reasonably prudent priest, pastor, or bishop. And while it may be possible to find that reasonably prudent clerics resist sexually abusing children, the court worried that the next case would be less clear.[63] Thus, the court found that an analysis dependent on professional standards within the Church violates the Supreme Court's prohibition against excessive entanglement with religion.[64]

D. Respondeat Superior

Even if a court finds that the Church hierarchy, meaning the governing organization or officials responsible for the cleric's employment within the Church, has committed no wrongs distinct from clergy misconduct, the Church may be held vicariously liable for its employee's misconduct.[65] Under the doctrine of respondeat superior, an employer is held liable for the tortious or criminal acts of an em-

59. Hester v. Barnett, 723 S.W.2d 544, 551 (Mo. Ct. App. 1987).

60. *Schmidt*, 779 F. Supp. at 326.

61. *Hester*, 723 S.W.2d at 551.

62. *Schmidt*, 779 F. Supp. at 327.

63. *See id.* at 327-28.

64. *See id.* at 328 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)). For further discussion on excessive entanglement, see Part III of this Comment.

65. *See* RESTATEMENT (THIRD) OF TORTS § 13, cmt. b (1999) ("Perhaps the most popular justification for vicarious liability is that the costs of an agent's torts should be borne by the enterprise [and] that a financially responsible party will respond if damages occur.").

ployee if the acts "were committed during the course of the employment and to further a purpose or interest, however excessive or misguided, of the employer."[66] Most clergy sexual abuse cases that address respondeat superior focus on whether the sexual misconduct was committed within the cleric's scope of employment.

In defining scope of employment, Florida's Third District Court of Appeal explained that:

> [a]n employee's conduct is within the scope of his employment, where (1) the conduct is of the kind he was employed to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master.[67]

Sexual assaults and batteries are generally held to be outside the scope of an employee's employment, but an exception to the rule may be found where the tortfeasor used his or her employment to commit the tort.[68] Notwithstanding the fact that allegations of a cleric's sexual misconduct often include situations where the cleric used his or her position in the Church to gain the trust of and access to a victim, most courts have been unwilling to apply this exception to clergy sexual abuse cases.[69]

In *Byrd v. Faber*, for example, the Supreme Court of Ohio addressed the viability of a claim against the Ohio Conference of Seventh Day Adventists based on the doctrine of respondeat superior.[70] There the plaintiff claimed that her pastor forced her into a sexual relationship.[71] The court held the doctrine inapplicable because the

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66. Iglesia Cristiana La Casa Del Señor, Inc. v. L.M., 783 So. 2d 353, 356 (Fla. 3d DCA 2001) (citation omitted).

67. *Id.* at 357.

68. *Id.*; Hennagan v. Dep't of Highway Safety & Motor Vehicles, 467 So. 2d 748, 751 (Fla. 1st DCA 1985) (finding that it could not be said, as a matter of law, that a trooper's sexual misconduct, which was committed under the guise of detaining a shoplifting suspect, was not within the trooper's scope of employment).

69. *See, e.g.,* Rita M. v. Roman Catholic Archbishop of L.A., 187 Cal. App. 3d 1453, 1461 (1986) ("It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church, [and the court cannot conclude that] the Archbishop 'ratified' the concupiscent acts of the priests."); Elders v. United Methodist Church, 793 So. 2d 1038, 1041 (Fla. 3d DCA 2001) ("As a matter of common sense, having sexual relations with a counselee is not part of the job responsibilities of a minister."); N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 599 (Okla. 1999) ("Ministers should not molest children. When they do, it is not a part of the minister's duty nor customary within the business of the congregation. Rather than increasing membership, the conduct would assuredly result in persons spurning rather than accepting a faith condoning the abhorrent behavior."); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 783 (Wis. 1995) (affirming that the alleged sexual misconduct of a priest "could not have been in the scope of his employment").

70. 565 N.E.2d 584, 585 (Ohio 1991).

71. *Id.*

Adventists "did not hire [the pastor] to rape, seduce, or otherwise physically assault members of his congregation," and the plaintiff did not allege that they "should reasonably have foreseen that [the pastor] would behave in this manner toward his parishioners."[72] Similarly, in *Iglesia Cristiana La Casa Del Señor v. L.M.*, Florida's Third District Court of Appeal refused to apply respondeat superior because the plaintiff failed to allege that the sexual misconduct took place on Church property, that the pastor's behavior was motivated by a desire to serve the Church, or that the pastor had been counseling her on the day of the crime.[73]

Note what these cases do not hold. These cases leave open the prospect that the Church may, under some circumstances, be held vicariously liable for the sexual misconduct of a cleric. These cases merely find that the allegations, as set forth in the individual complaints, fail to support the theory of respondeat superior. A plaintiff-parishioner may, on the other hand, be successful by proving the abuse took place on Church property, or that the cleric characterized his or her behavior as an act of God, or that the abuse took place under the auspice of a counseling session. In addition to the causes of action already discussed in this Comment, the Church may be directly liable for the negligent hiring, supervision, and retention of its clergy.

E. Negligent Hiring, Supervision, and Retention

While the doctrine of respondeat superior generally fails to survive the Church defendant's motion to dismiss in a clergy sexual misconduct case, religious institutions are often held liable for a cleric's misconduct under the doctrines of negligent hiring, negligent supervision, and negligent retention (collectively referred to as "negligent hiring, supervision, and retention").[74] The theory of negligent hiring, supervision, and retention is similar to the doctrine of respondeat superior in that the employer is held liable for the employee's conduct; but unlike respondeat superior, negligent hiring, supervision, and retention does not require a plaintiff to allege that the employee's misconduct was within the scope of his or her employment.[75] Of course, this lowered hurdle does not mean that an employer is strictly liable for any acts committed by his or her employee, against any person and under any circumstances; limitations have developed

72. *Id.* at 588.

73. Iglesia Cristiana La Casa Del Señor, Inc. v. L.M., 783 So. 2d 353, 357-58 (Fla. 3d DCA 2001).

74. *See* Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988) (holding that although the priest's acts did not create a basis for holding the diocese vicariously liable, the diocese may be directly liable for negligently supervising the priest).

75. Garcia v. Duffy, 492 So. 2d 435, 438 (Fla. 2d DCA 1986).

on a case-by-case basis.[76] As the *Second Restatement of Torts* explains:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.[77]

Under this definition, it seems that many religious institutions have a duty to exercise reasonable care in hiring, supervising, and retaining members of the clergy because clerics often live on church premises; and unlike secular employers, the Church hierarchy exerts control over every aspect of its "employees'" lives. In fact, the Church's blending of personal and professional lives is motivated, at least in part, by the Church's desire to know its clergy, and this knowledge is a critical element of the tort. The court's determination of when the Church knew or should have known of the cleric's unfitness—in other words, the timing of the Church's knowledge—determines whether the Church is liable for negligent hiring, negligent supervision, negligent retention, or any combination of the three. The tort is committed at the point in the employee's tenure when the employer first had knowledge or constructive knowledge of foreseeable harm.[78]

Florida recognized a cause of action for negligent hiring, supervision, and retention in *Mallory v. O'Neil*.[79] The Florida Supreme Court stated that an employer may be liable for negligence where he or she knowingly employed a dangerous person and knew or should have known that the person "was dangerous and incompetent and liable to do harm."[80] In establishing a prima facie case, a plaintiff must prove

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76. *See Iglesia Cristiana La Casa Del Señor*, 783 So. 2d at 358 ("For the Church to be held liable for negligent supervision, it must have had constructive or actual notice that [the defendant] was unfit to work as a pastor at the Church."); *Byrd*, 565 N.E.2d 584, 590 (raising the pleading standards for negligent hiring and holding that "the plaintiff must plead facts which indicate that the individual hired had a past history of criminal, tortious, or otherwise dangerous conduct about which the religious institution knew or could have discovered through reasonable investigation.").

77. RESTATEMENT (SECOND) OF TORTS § 317 (1965).

78. *Garcia*, 492 So. 2d at 438. Some courts refer to the cause of action as negligent hiring and employment. *See, e.g.*, Abbott v. Payne, 457 So. 2d 1156 (Fla. 4th DCA 1984); Petrik v. N.H. Ins. Co., 379 So. 2d 1287, 1289 (Fla. 1st DCA 1979). Others use the term negligent hiring, training, and retention. *See, e.g.*, Tex. Scaggs, Inc. v. Joannides, 372 So. 2d 985, 986 (Fla. 2d DCA 1979).

79. 69 So. 2d 313, 315 (Fla. 1954).

80. *Id.*

that (1) the employer was required but failed to make an appropriate investigation of the employee; (2) an appropriate investigation would have revealed the unfitness of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.[81] These elements contribute to the broader notion of reasonable foreseeability and enable courts to evaluate an employer's employment practices to determine whether the employer breached a duty of care.

Third party tort claims based on a religious institution's negligent hiring, supervision, and retention of a member of its clergy are highly contentious because the inquiry requires a court to evaluate the reasonableness of a Church's employment decisions. The Church's greatest defense against such claims is that the court's investigation of a religious institution's employment practices is barred by the First Amendment. Although the United States Supreme Court has recognized that "the appointment [of clergy] is a canonical act, [and that] it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them,"[82] it has not addressed whether the First Amendment bars a claim for negligent hiring, supervision and retention.

III. NEGLIGENT HIRING, SUPERVISION, AND RETENTION AND THE FIRST AMENDMENT

A. Split of Authority

In seeking to hold a religious institution responsible for the sexual misconduct of a cleric and for the resulting injury to third parties, the tort of negligent hiring, supervision, and retention has emerged as one of the most viable theories of civil liability, and in light of the *Boston Globe*'s reports on Cardinal Law's practice of protecting felonious priests, it could be one of the most useful tools for holding the Church liable. But there is at least one problem: a split of authority. While:

> [s]ubstantial authority in both the state an federal courts concludes that . . . the First Amendment is not violated by permitting the courts to adjudicate tort liability against a religious institution[,] . . . contrary authority . . . concludes that any tort claim against a religious institution founded on negligent hiring or su-

81. Malicki v. Doe, 814 So. 2d 347, 362 (Fla. 2002) (citing *Garcia*, 492 So. 2d at 440).
82. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 7 (1929).

> pervision . . . is barred because the adjudication of the tort dispute would necessarily . . . interfer[e] with its religious autonomy.[83]

The United States Supreme Court should explicitly hold that the First Amendment does not bar a claim for negligent hiring, supervision, and retention against a religious institution based on the sexual misconduct of its clergy.

B. Analysis Under the First Amendment

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[84] The Supreme Court has made the First Amendment applicable to the states through incorporation into the Fourteenth Amendment.[85] Therefore, state tort law must avoid restraining the free exercise of religion. In applying the First Amendment to state and federal laws, courts have recognized that the Free Exercise Clause and the Establishment Clause serve distinct purposes.

C. The Free Exercise Clause

The Free Exercise Clause—"Congress shall make no law . . . prohibiting the free exercise" of religion[86]—guarantees, "first and foremost, the right to believe and profess whatever religious doctrine one desires."[87] Nevertheless, as the United States Supreme Court explained in *Cantwell v. Connecticut*, the First Amendment "embraces

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83. *Malicki*, 814 So. 2d at 358. *Compare* Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (finding that the First Amendment bars a claim of negligent hiring, supervision, and retention because the inquiry "might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs"), Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 445 (Me. 1997) (holding that the First Amendment bars a claim of negligent supervision because "imposing a secular duty of supervision on the Church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy"), *and* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995), *cert. denied*, 516 U.S. 1116 (1996) (concluding that the First Amendment bars a claim of negligent hiring or retention because the court would be required to interpret "church canons and internal church policies and practices"), *with* Doe v. Hartz, 970 F. Supp. 1375, 1431-32 (N.D. Iowa 1997) (finding that the First Amendment does not bar a negligent supervision claim because the tort is based on neutral principles of law), Isley v. Capuchin Province, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (concluding that the First Amendment does not bar a claim of negligent supervision because the court would not be required to interpret church doctrine), *and* Moses v. Diocese of Colo., 863 P.2d 310, 320-21 (Colo. 1993) (holding that the First Amendment does not bar a claim for negligent hiring and supervision because analysis would "not require interpreting or weighing church doctrine and neutral principles of law can be applied"), *cert. denied*, 511 U.S. 1137 (1994).

84. U.S. CONST. amend. I.

85. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995).

86. U.S. CONST. amend. I.

87. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[88] Since the freedom to act according to one's belief is not absolute, the court must first ask whether the regulated conduct is "rooted in religious belief."[89] Even if the behavior is religiously based, neutral laws of general application do not violate the First Amendment.[90] But "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest"; the court will apply strict scrutiny to determine whether the law violates the First Amendment.[91] Consequently, if the conduct being regulated is religiously based, the court must identify the law's purpose and function.

The Supreme Court engaged in this neutral-law-of-general-application inquiry in *Employment Division v. Smith*[92] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[93] In *Smith*, the Court examined an Oregon statute that proscribed the use of controlled substances, including the religious use of peyote.[94] The plaintiffs conceded that the criminal law had not been designed to inhibit their religious practices and that it was constitutional as applied to the general public.[95] Astounded by this concession, the Court reminded the parties that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century . . . contradicts that proposition."[96] Because the statute did not violate the First Amendment, Oregon could deny unemployment compensation to unemployed workers who had been discharged as a result of their religious drug use.[97]

Three years later, in *Lukumi Babalu Aye*, members of the Santerian Church challenged the constitutionality of the City of Hialeah's ban on the ritual sacrifice of animals.[98] The Supreme Court acknowledged that a neutral law of general applicability "need not be justi-

88. 310 U.S. 296, 303-04 (1940).

89. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

90. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997).

91. *Lukumi Babalu Aye*, 508 U.S. at 531-32, 546.

92. 494 U.S. 872 (1990).

93. 508 U.S. 520 (1993).

94. *Smith*, 494 U.S. at 876.

95. *See id.* at 878.

96. *Id.* at 878-79; *see, e.g.,* Jones v. Wolf, 443 U.S. 595, 606 (1979) (explaining that "[t]he neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees or purchase goods").

97. *Smith*, 494 U.S. at 890.

98. *Lukumi Babalu Aye*, 508 U.S. at 535-36.

fied by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice"; but a law that targets the practices of a particular religion and that selectively imposes burdens on religious conduct requires a compelling governmental interest to support it.[99] Accordingly, the Court initiated an inquiry to determine first, whether the ban on ritual animal sacrifice was neutral; second, whether the laws were of general application; and third, whether the laws were supported by a compelling governmental interest and narrowly tailored to serve that interest.[100]

The Supreme Court found that although the texts of Hialeah's ordinances were facially neutral, the legislative histories revealed that, in drafting the ordinances, the City had been improperly motivated by a desire to restrict the religious practices of Santeria.[101] Second, the laws were not generally applied to all members of the public who were engaged in similar activities.[102] For example, the ordinances outlawed the religious sacrifice of animals but not the nonreligious killing of animals by hunters and fishermen.[103] Finally, having determined that Hialeah's ordinances were not neutral laws of general application, the court applied strict scrutiny and found that even if the government's interests were compelling, the ordinances were not narrowly drawn to accomplish those interests; the laws were therefore unconstitutional under the Free Exercise Clause of the First Amendment.[104]

Unlike Hialeah's ordinances, however, a cause of action for negligent hiring, supervision and retention does not violate the Free Exercise Clause. While it may be conceded, *arguendo*, that the Church's employment decisions constitute religious conduct,[105] common law torts are analogous to Oregon's outlawing of controlled substances in that they are neutral laws of general application and are therefore enforceable against a religious organization. As the court explained in *Smith v. O'Connell*, "[i]t is easy to envision the kinds of 'anomalies' that could result from such an absolutist interpretation of the free exercise clause. For example, laws prohibiting murder would have no

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99. *Id.* at 531-34 (citing *Smith*, 494 U.S. at 887-89) ("Neutrality and general applicability are interrelated, and, as becomes apparent in [*Lukumi Babalu Aye*], failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

100. *Lukumi Babalu Aye*, 508 U.S. at 531-34.

101. *See id.* at 534-36.

102. *Id.* at 545-46.

103. *See id.* at 545.

104. *Id.* at 546 (finding that "all four ordinances are overbroad or underinclusive in substantial respects" and that "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree").

105. In *Malicki*, the Church Defendants never alleged that their employment decisions were guided by religious doctrine, and the Florida Supreme Court concluded that the Free Exercise Clause had not been implicated. *See* Malicki v. Doe, 814 So. 2d 347, 360-361 (Fla. 2002).

application to human sacrifices performed pursuant to some religious practice."[106] Likewise, the compelling need to protect both adult and minor parishioners from clergy sexual misconduct, and to prevent the Church's sustained efforts to hide or ignore that misconduct, meets the requirements of the court's strict scrutiny. For these reasons, the Supreme Court should find that negligent hiring, supervision and retention, as applied to a religious institution, is constitutional under the Free Exercise Clause.

D. *The Establishment Clause*

The second component of the First Amendment, the Establishment Clause, states that "Congress shall make no law respecting an establishment of religion."[107] This mandate for the separation of church and state, a cornerstone of American democracy, prevents both state and federal governments from enacting laws that "aid one religion, aid all religions, or prefer one religion over another."[108] Several tests have emerged to guide the courts' analysis of alleged violations of the First Amendment's Establishment Clause.[109] For instance, in addressing constitutional issues that arise within the scope of public education, the court has applied the *Lemon* test set forth in *Lemon v. Kurtzman*,[110] the "endorsement" test, which was first articulated by Justice O'Connor and later adopted by a majority of the Court in *County of Allegheny v. ACLU*,[111] and the "coercion" test, which was born out of the Court's decision in *Lee v. Weisman*.[112]

While courts are free to apply any or all of the three tests, and to invalidate statutes that fail any one of them,[113] First Amendment analysis of third party tort claims against a religious institution most often begins with a discussion of the *Lemon* test.[114] In *Lemon*, the Court established a three-part test to determine whether a neutral law violates the Establishment Clause: (1) the legislation must have a secular purpose; (2) the legislation must not have the primary ef-

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106. Smith v. O'Connell, 986 F. Supp. 73, 80 (D.R.I. 1997).

107. U.S. CONST. amend. I.

108. Abbington Sch. Dist. v. Schempp, 374 U.S. 203, 216 (1963) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)).

109. *See* Newdow v. United States Cong., 292 F.3d 597, 606-07 (9th Cir. 2002).

110. 403 U.S. 602 (1971).

111. 492 U.S. 573 (1989).

112. 505 U.S. 577 (1992).

113. *See* Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310-16 (2000) (applying all three tests to invalidate a school district's practice of permitting student-led prayers at high school football games).

114. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991) (discussing the third prong of *Lemon*); L.L.N. v. Clauder, 563 N.W.2d 434, 440 (Wis. 1997) (explaining the three-part test established in *Lemon*).

fect of advancing or inhibiting religion; and (3) the legislation must not promote an excessive government entanglement with religion.[115]

While the Supreme Court designed the *Lemon* test to bring greater uniformity to First Amendment analysis, the test—particularly in the 1990s—has been neither consistently applied nor formally overturned. For example, subsequent cases have used the third prong, excessive entanglement, as a factor in considering the primary effect of the law.[116] Other cases have been decided on the basis of either of the first two prongs, and the courts have failed to address the excessive entanglement prong altogether.[117]

Despite this trend to devalue the third prong, the few cases that have applied Establishment Clause analysis to holding a religious organization liable for the tortious conduct of its clergy have bypassed the first two prongs of the *Lemon* test and have focused on the opportunity for the State to become excessively entangled in the Church's employment practices.[118]

The Supreme Court of Wisconsin took this approach in *Pritzlaff* and found that the parishioner's claims were barred by the First Amendment.[119] Alleging that Father John Donovan used his position as a priest to coerce her into a sexual relationship with him, Ms. Judith Pritzlaff sued the Archdiocese of Milwaukee for negligent hiring, training, and supervision.[120] Although the court found that Ms. Pritzlaff's claims were time barred, it proceeded with its analysis under the assumption that a cause of action for negligent hiring or retention existed in Wisconsin at the time of the alleged relationship.[121]

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115. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

116. *See, e.g.,* Agostini v. Felton, 521 U.S. 203, 232 (1997) ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect."); Porta v. Klagholz, 19 F. Supp. 2d 290, 297 (D.N.J. 1998) ("The Court essentially collapsed the *Lemon* test."); Bagley v. Raymond Sch. Dept., 728 A.2d 127, 141 ("[T]he effect and entanglement prongs must be seen as parts of a unitary consideration.").

117. *See Newdow*, 292 F.3d at 611 (refusing to examine the second and third prongs of the *Lemon* test because it had been determined that the 1954 Act, which inserts the words "under God" into the Pledge of Allegiance, violated the first prong and was therefore unconstitutional).

118. *See* Smith v. O'Connell, 986 F. Supp. 73, 81 (D.R.I. 1997) (holding that "it is unlikely that exercising jurisdiction over [a tort action against the Church] will result in any 'excessive entanglement' between church and state"); *Schmidt*, 779 F. Supp. at 328 ("It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children."); *L.L.N.*, 563 N.W.2d at 440 ("It is well-settled that excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices.").

119. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 782 (Wis. 1995).

120. *See id.* at 782-84.

121. *See id.* at 789 (citing *In re* Guardianship of L.W., 482 N.W.2d 60 (Wis. 1992) (allowing a moot issue to be decided where it is likely to arise again and should be resolved by the court to avoid uncertainty)). The *Pritzlaff* court shifted from a discussion on "negligent hiring, training and supervision" to an analysis of "negligent hiring or retention" without

According to the court, "Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining [Father] Donovan because he was incompetent or otherwise unfit"; but the First Amendment barred the court from setting standards for competent priests.[122]

The court applied the third prong of the *Lemon* test, though not explicitly, and expressed its concerns that inquiry into a Church's hiring practices would improperly entangle the court in Church policies and practices since "traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation."[123] The majority seems to have been influenced by a law review article that rhetorically asked:

> If negligent selection of a potential pedophile for the religious office of priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile?[124]

Had the justices been able to envision a situation where the Church *knew* that a seminarian was a pedophile but hired him anyway and continued to put children in his charge, perhaps their answer would have been different;[125] instead, they insisted that "[a]ny award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative [sic] of the text and history of the establishment clause."[126] Fearing entanglement, the court granted the Church defendants' motion to dismiss.[127]

The Wisconsin Supreme Court revisited this issue one year later in *L.L.N. v. Clauder*, where an adult patient became sexually involved with a priest who had counseled her while serving as a hospital chaplain; the patient later brought a claim for negligent supervi-

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explanation; apparently, the court is assuming that these causes of action are synonymous. *See id.* at 789-90.

122. *Id.* at 790.

123. *Id.* at 791 (quoting *Schmidt*, 779 F. Supp. at 332).

124. *Id.* at 790 (quoting James T. O'Reilly & Joaan M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional & Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 48 (1994)).

125. *See, e.g.*, Smith v. O'Connell, 986 F. Supp. 73, 75 (D.R.I. 1997) (alleging that the Church "knew that the priests were pedophiles and not only failed to take appropriate preventative action, but also actively concealed the priests' sexual misconduct").

126. *Pritzlaff*, 533 N.W.2d at 791 (quoting Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)). *But see* Byrd v. Faber, 565 N.E.2d 584, 590 (Ohio 1991) (asserting that "even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts").

127. *Pritzlaff,* 533 N.W.2d at 791-92.

sion against the diocese that assigned the priest to the hospital.[128] The court discussed its decision in *Pritzlaff* and reasserted its belief that secular remedies could offend church doctrine.[129] As the court explained,

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices . . . . Therefore, due to this strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience.[130]

Accordingly, the court granted summary judgment in favor of the Church defendants.[131]

The Wisconsin Supreme Court's reasoning in *Pritzlaff* and *L.L.N.* is flawed. First, the court seems to have been skeptical of the facts alleged in each case and consequently held little sympathy for the adult plaintiffs. In *Pritzlaff*, the court noted that Ms. Pritzlaff claimed, twenty-seven years after her initial experience with Father Donovan, that "the sexual relationship was 'without her consent' and was a result of 'force and coerc[ion].'"[132] Then the court quipped: "Of course, she must allege this as fact because a consensual sexual relationship between two adults is no longer actionable in Wisconsin."[133] In *L.L.N.*, the court's skepticism rings in its statement that the "undisputed facts demonstrate that Clauder, a single man, engaged in a consensual sexual relationship with an adult, single, female."[134] One can only wonder if the cases would have been decided differently if

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128. 563 N.W.2d 434, 436-42 (Wis. 1997).

129. *See id.* at 441.

130. *See id.* (quoting O'Reilly & Strasser, *supra* note 124, at 45-46); *see also* Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576-77 (1st Cir. 1989) (finding that the Free Exercise Clause prohibits clergy members from maintaining wrongful termination actions against the Church). *But see* Gen. Council on Fin. & Admin., United Methodist Church v. Cal. Superior Court., 439 U.S. 1369, 1373 (stating that First Amendment concerns "are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged"); Alicea v. New Brunswick Theological Seminary, 581 A.2d 900, 908 (N.J. Super. Ct. App. Div. 1990) (disagreeing with *Natal* and finding that a court has jurisdiction to determine whether a religious organization followed its own procedural rules).

131. *See L.L.N. v. Clauder*, 563 N.W.2d at 444-45.

132. *Pritzlaff*, 533 N.W.2d at 786.

133. *Id.*

134. *L.L.N. v. Clauder*, 563 N.W.2d at 443.

the plaintiffs had been children or even adults with stronger allegations.

Second, the court's opinions are flawed because they focus on punishment rather than prevention. Recall that the *Second Restatement of Torts* defines an employer's duty under the tort of negligent hiring, supervision, and retention as a duty "to exercise reasonable care so to control his servant while acting outside the scope of his employment as to *prevent* him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm."[135] This duty requires a religious organization to prevent foreseeable harm; it does not mandate a particular path of punishment. While it is true that the First Amendment prohibits state intervention in internal church disputes that concern religious matters and require interpretation of religious doctrine,[136] the duty to prevent harm is consistent with church doctrine; the limits canon law places on the Church's authority to discipline (redemption and forgiveness) are irrelevant in determining whether the Church acted to prevent harm. Thus, the court may avoid interpreting ecclesiastical law. Enforcing this duty will entangle the courts in no religious policies, and a cause of action for negligent hiring, supervision, and retention passes the Establishment Clause tests.

IV. *MALICKI V. DOE* AND *DOE V. EVANS*

On March 14, 2002, the Florida Supreme Court contributed to the national dialogue on the relationship between clergy sexual abuse cases and the First Amendment of the United States Constitution by issuing two opinions, *Malicki v. Doe*[137] and *Doe v. Evans*.[138] These cases were factually similar, although *Malicki* included the abuse of a minor, and both cases required the courts to expressly construe the First Amendment.[139] Despite factual similarities and identical law,

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135. RESTATEMENT (SECOND) OF TORTS § 317 (1965) (emphasis added).

136. This principle is referred to as the "religious autonomy doctrine." As the Supreme Court explained in *Milivojevich*, "civil courts are bound to accept the decisions of the highest judiciaries of a religious organization . . . on [internal] matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 713 (1976). The religious autonomy doctrine is most often asserted by the Church defendants in cases where a cleric is challenging disciplinary actions taken against him, *see* Natal v. Christian & Missionary Alliance 878 F.2d 1575, 1576-77 (1st Cir. 1989); Hutchinson v. Thomas, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986), or in cases concerning disagreements among divisions of a Church over Church property, *see* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94 (1952).

137. 814 So. 2d 347 (Fla. 2002).

138. 814 So. 2d 370 (Fla. 2002).

139. *See* Doe v. Malicki, 771 So. 2d 545 (Fla. 3d DCA 2000); Doe v. Evans, 718 So. 2d 286 (Fla. 4th DCA 1998).

the decisions made by the Third and Fourth District Courts of Appeal contradicted each other. The Florida Supreme Court's March 14 opinions represent a first step in ending the dispute.

In *Malicki*, a minor and an adult parishioner claimed that Father Jan Malicki sexually assaulted them on several occasions on the premises of St. David Catholic Church, and they jointly sued Father Malicki, St. David Catholic Church, and the Archdiocese of Miami (the latter two defendants are referred to collectively as the "Church Defendants") on eight counts.[140] The first two counts set forth claims of negligent hiring, supervision, and retention against the Church Defendants based on Father Malicki's sexual misconduct and the Church's failure "'to make inquiries into Malicki's background, qualifications, reputation, work history, and/or criminal history prior to employing him in the capacity of Associate Pastor.'"[141] Reaching for their shield, the Church Defendants claimed that the court's inquiry was barred by the First Amendment because it would "'involve the internal ecclesiastical decisions of the Roman Catholic Church required by Canon Law,'" and they moved to dismiss the complaint.[142]

The trial court agreed that the First Amendment barred review of the Church's employment practices and, prior to addressing the veracity of the plaintiffs' factual allegations, granted the Church Defendants' motion to dismiss with prejudice.[143] On appeal, the Third District explained that its review was grounded in tort law and not religious doctrine, and went on to consider whether the Church Defendants knew or should have known about Father Malicki's sexual misconduct and whether they failed to protect the parishioners from reasonable harm.[144] In this manner, the Third District held that the First Amendment tolerates a claim for negligent hiring and supervision.[145]

In *Doe v. Evans*, a female parishioner filed a claim against the Reverend William Evans, the Church of the Holy Redeemer, Inc., the Diocese of Southeast Florida, Inc., and Bishop Calvin Schofield, Jr. (the latter three defendants are referred to collectively as the "Church Defendants"), consisting of several counts, including negligent hiring and supervision.[146] The parishioner alleged that Reverend

140. *Malicki*, 814 So. 2d at 352.

141. *Id.* (quoting the Complaint jointly filed by the minor and adult parishioners).

142. *Id.* at 353 (quoting the Church Defendants' motion to dismiss); *see* Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 713-14 (1976) (explaining that civil courts have no jurisdiction over "purely ecclesiastical" disputes concerning subjects such as "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them").

143. *Malicki*, 814 So. 2d at 353.

144. *Malicki*, 771 So. 2d at 548.

145. *Id.*

146. Doe v. Evans, 814 So. 2d 370, 371-72 (Fla. 2002).

Evans initiated a counseling relationship with her and sexually exploited the difficulties she was having in her marriage.[147] She also claimed that although the Church Defendants had actual knowledge of prior incidents where Evans had become sexually involved with parishioners he had intended to counsel, and although the Church Defendants "had the right to exercise control over" Evans, they did nothing "to rectify the situation."[148] Finally, the parishioner alleged that the Church Defendants' actions, or more precisely their inactions, were not religiously motivated.[149] Arguing that the First Amendment barred the parishioner's claim for negligent hiring and supervision, the Church Defendants moved to dismiss.[150]

The trial court granted the motion to dismiss, and the Fourth District Court of Appeal affirmed.[151] The court found that the First Amendment barred the negligent hiring and supervision claims but asserted that a more compelling state interest, such as protecting a child from sexual abuse, may have forced a different outcome.[152] The parishioner appealed.

Although the Florida Supreme Court decided *Malicki v. Doe* and *Doe v. Evans* separately, the opinions were issued on the same day, and the court expressly recognized that the outcome of *Malicki* controlled *Evans*.[153] In fact, the court dedicated an entire section of the *Malicki* opinion to a summary of the facts and issues presented in *Evans*.[154] Thus, a review of the court's decision in *Malicki* also serves to explain the court's analysis of *Evans*.[155]

After an extensive discussion on First Amendment analysis in general, the Florida Supreme Court examined the factual allegations in *Malicki* under the Free Exercise and Establishment Clauses of the

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147. *Id.* at 372.

148. *Id.*

149. *Id.*

150. *Id.*

151. Doe v. Evans, 718 So. 2d 286, 287 (Fla. 4th DCA 1998).

152. *Id.* at 289-90. The Fourth District explained:

> [W]e are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly . . . creates a situation in which such injuries are likely to occur. We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of its clerics. We would draw the line at criminal conduct.

Id. at 289 (emphasis omitted).

153. *Evans*, 814 So. 2d at 371 ("For the reasons expressed in [*Malicki*], we hold that the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to a third party arising from the alleged sexual misconduct by one of its clergy members.").

154. *See* Malicki v. Doe, 814 So. 2d 347, 359-60 (Fla. 2002).

155. *But see Evans*, 814 So. 2d at 382 (Harding, J., dissenting) ("[T]he majority quashes the lower court's decision in this case on the basis of a questionable extension of *Malicki*.").

First Amendment and determined that the Church is not immune from a tort claim of negligent hiring, supervision, and retention.[156] The court first noted that the allegations set forth in the complaint—namely that the Church Defendants were negligent in failing to research Malicki's character and in allowing Malicki to supervise the parishioners when the Church Defendants "either knew or should have known that Malicki had the propensity to commit sexual assaults and molestations"—closely paralleled the "classic elements" of negligent hiring and negligent supervision claims.[157] Justice Pariente distinguished claims for negligent hiring, supervision and retention from claims for illegal hiring or discharge of a minister: claims based on negligence turn on the reasonable foreseeability of the cleric's misconduct and not on the religious institution's reasons for hiring or firing the cleric.[158] Since the question of foreseeability does not implicate religious doctrine, the court found judicial scrutiny consistent with the Free Exercise Clause of the First Amendment.[159] Nor does the application of tort law to a religious institution by a secular court implicate the Establishment Clause. As the court explained, "imposing tort liability based on the allegations of the complaint neither advances nor inhibits religion."[160] Because the court found that judicial review of the parishioners' negligence claims does not run afoul of the Free Exercise or Establishment Clauses, it explicitly disapproved the Fourth District's compelling state interest requirement.[161]

But *Malicki* does not end the discussion on the First Amendment's control over tort claims against a religious institution in the state of Florida. In the third to the last sentence of its opinion, the Florida Supreme Court qualified its decision. The court restricted its holding to a statement that:

> [T]he First Amendment cannot be used *at the initial pleading stage* to shut the courthouse door on a plaintiff's claims, which are founded on a religious institution's alleged negligence arising from the institution's failure to prevent harm resulting from one of its

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156. *See Malicki*, 814 So. 2d at 357 ("Although an entanglement inquiry is associated with the adjudication of an Establishment Clause claim, the extent to which the courts will be called upon to determine matters of church practice also implicates the Free Exercise Clause.").

157. *Id.* at 362.

158. *See id.* at 363 ("[T]he court does not inquire into the employer's broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring.") (quoting Van Osdol v. Vogt, 908 P.2d 1122, 1132-33 (Colo. 1996)).

159. *Id.* at 363-64.

160. *Id.* at 364.

161. *See id.* ("[W]e reject the distinction that the Fourth District drew in *Evans*, 718 So. 2d at 289-90, that would apparently allow a negligent supervision claim against a [C]hurch defendant only if the underlying sexual misconduct involved criminal activity . . . .").

> clergy who sexually assaults and batters a minor or adult parishioner.[162]

The court's qualification is important because the standard of review at the pleading stage is more relaxed. A court must assume that all facts alleged in the complaint are true, draw all reasonable inferences favorable to the plaintiff, and decide the issues on questions of law only.[163] Thus, *Malicki* and *Evans* leave open the First Amendment's role at later stages of the trial process, and it is unclear whether the Church will be able to lift its shield to avoid liability in the future.[164]

V. CONCLUSION

Beyond First Amendment concerns, litigation against the Church is fraught with political considerations.[165] Attorneys representing victims of clergy abuse are mindful of the line between aggressive advocacy and an attack on religion.[166] One attorney confessed that he ini-

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162. *Id.* at 365 (emphasis added).

163. Connolly v. Sebeco, Inc., 89 So. 2d 482, 484 (Fla. 1956).

164. For example, several courts have held that certain document discovery requests create First Amendment problems. *See, e.g.,* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31-34 (1984) (protecting information regarding the identity of contributors to and members of a religious foundation); Baldwin v. Comm'r, 648 F.2d 483, 488 (8th Cir. 1981) (finding that compliance with discovery requests would infringe on a religious organization's freedom of association). For a general discussion on First Amendment issues in relation to discovery requests, see Nicholas P. Cafardi, *Discovering the Secret Archives: Evidentiary Privileges for Church Records*, 10 J.L. & RELIGION 95 (1993/1994); Jeffrey Hunter Moon, *Protection Against the Discovery or Disclosure of Church Documents and Records*, 39 CATH. LAW. 27 (1999).

165. For example, most attorneys have been reluctant to file charges under the Racketeer Influenced and Corrupt Organizations Act (RICO), despite its potential for treble damages, for fear of labeling Church officials as "gangsters." *See* Associated Press, *Lawsuits, Prosecutions Take Legal Matters Out of Church's Hands*, *at* http://www.cnn.com.law (last visited May 27, 2002) ("Charges for [Church] superiors could include violation of state laws requiring reporting of suspected child abuse or broader charges of . . . racketeering."); Adam Liptak, *Flush Times for Legal Vanguard in Priest Lawsuits*, N.Y. TIMES, Apr. 27, 2002, at A14; Dirk Olin, *The Confessional*, AM. LAW., June 2002, at 81 *available at* http://www.gtlaw.com/pub/media/2002/confessional.pdf (last visited Jan. 7, 2003) ("A broad-based, scattergun attack on the church itself would be a disservice to the good works the institution provides."). *But see* Bob Van Voris, *RICO a Long Shot in Church Sex-Abuse Case*, NAT'L L.J., Apr. 1, 2002, *available at* www.law.com (last visited Nov. 25, 2002) (discussing Minnesota lawyer Jeffrey Anderson's decision to file RICO claims against a group of Catholic bishops and the hurdles he will face in bringing the case).

166. While these cases, at least from the victim's perspective, are seldom about money, settlement agreements and awards for compensatory and punitive damages threaten to bankrupt individual dioceses. *See* Stephen Kurkjian & Michael Rezendes, *Bankruptcy Filing Called Option for Archdiocese*, BOSTON GLOBE, Aug. 2, 2002, at A1:

> The bankruptcy option is also being considered at a time when the archdiocese is grappling with a fiscal crisis . . . and a downturn in the economy that have forced church officials to cut this year's operating budget by as much as 40 percent, affecting urban parishes, parochial schools, and other church programs.

See also Olin, *supra* note 165, at 83 ("[M]any archdioceses' insurance policies are tapped out or insufficient to cover the potential liabilities . . . . [T]he country's 194 dioceses are le-

tially had difficulty believing that he was "not suing God."[167] Another attorney found it easier to make a distinction "between the faith and the men who are a part of the faith. Men make mistakes, they can be corrupted, they can be criminal."[168] Media coverage has helped to define the line through increased public awareness of Church policies and practices.[169] As victims share their stories, calls for reform grow stronger.

A. Mandatory Reporting and Clergy Privilege

Although all states have adopted mandatory reporting laws that require childcare workers to report incidents of known or suspected child abuse to local officials, most states excuse members of the clergy as mandatory reporters.[170] In Florida, for example, mandatory reporters include physicians, health care professionals, school teachers, and social workers, but not members of the clergy.[171] In fact, although the Florida legislature recently amended Section 39.204, *Florida Statutes*, which abrogates certain privileged communications in cases involving child abuse, the amended statute maintains the penitent priest privilege.[172] Other states have responded to the clergy sexual abuse scandal more swiftly. On May 3, 2002, Massachusetts Governor Jane Swift signed legislation requiring clergy members to report allegations of child sex abuse.[173] The law requires priests, rab-

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gally autonomous entities, reducing the likelihood of cross-jurisdictional exposure, but even [a] conservative estimate of payouts . . . comes to more than $300 million."). *But see* Charles M. Sennott, *Money Concerns Said Not Utmost*, BOSTON GLOBE, Apr. 22, 2002, at A13 ("Most Vatican specialists insist that money is not the main issue, and the devastating financial ramifications of the scandals in the American archdioceses will actually have little impact on the Vatican's finances."). For articles on the financial cost of defending clergy sexual abuse cases, see generally http://www.boston.com/globe/spotlight/abuse/cost/ (last visited Jan. 7, 2003). Moreover, accusations made against a member of the clergy often lead to divisions within the Church's congregation. *See, e.g.*, Jodi Wilgoren, *An Ousted Priest, His Offense Long Past, Wistfully Departs*, N.Y. TIMES, Aug. 1, 2002, *available at* http://www.nytimes.com/2002/08/01/national/01PRIE.html (last visited Jan. 7, 2003).

167. Bayles, *supra* note 17 (quoting attorney Darrell Papillon of Baton Rouge).

168. Olin, *supra* note 165, at 80 (quoting Cesar Alvarez, CEO of Greenberg, Traurig).

169. For complete coverage of the Church scandal in Boston, see http://www.boston.com/globe/spotlight/abuse/ (last visited Jan. 7, 2003); Belluck, *supra* note 17 (recognizing "the extraordinary public interest" in Cardinal Law's deposition).

170. *See* Ruth Cornell, *The Church and The Law in the Ninth Circuit Concerning Mandatory Reporting of Sexual Abuse: What the Legal Advocate Representing a Church or Clergy Needs to Know About Ninth Circuit Child Sexual Abuse Reporting Statutes*, 1 J. LEGAL ADVOC. & PRAC. 137, 138 (1999); Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 LAW & PSYCHOL. REV. 409, 413-20 (1994).

171. FLA. STAT. § 39.201 (2002).

172. *See* 2002 Fla. Sess. Law. Serv. 174 (West) (amending FLA. STAT. § 39.204(3)); FLA. STAT. § 39.201 ("The privileged quality of communication . . . *except* that between . . . clergy and person . . . does not apply to any situation involving known or suspected abuse . . . .") (emphasis added).

173. MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2002).

bis, ordained ministers, and other leaders of religious bodies to report incidents of abuse to state officials within thirty days of discovery.[174]

All states should follow Massachusetts's lead and, if necessary, amend their mandatory reporting laws to include members of the clergy. The decision to report sexual abuse must be taken out of the hands of Church officials, who have a conflict of interest when it comes to reporting clergy sexual misconduct. Ironically, the Archdiocese of Boston failed to notify proper authorities of the heinous crimes committed by members of its clergy because the Church hierarchy wanted to protect the priesthood and avoid scandal within the Church. Mandatory reporting laws, furthermore, eliminate First Amendment issues, making it easier to hold the Church responsible for its failure to protect children from known pedophiles. Mandatory reporting laws are neutral laws of general application, and a determination of whether the Church neglected to report known or suspected incidents of child abuse will not require inquiry into church doctrine. Finally, mandatory reporting laws are designed to protect children who are silenced by sexual predators or who are unable to speak for themselves. Spiritual counselors, like teachers or health care workers, must provide those children with a voice.

1. Reconciliation and Waiver of the Shield

After *The Boston Globe*'s Spotlight Team reported on the Boston Archdiocese's protection of Reverend John J. Geoghan in January 2002, the world waited, and waited, for official word from the Vatican. Almost three months later, Pope John Paul II responded in the form of his annual pre-Easter letter.[175] The Pope showed great concern for the world's priests, stating that "as priests we are personally and profoundly afflicted by the sins of some of our brothers who have betrayed the grace of Ordination in succumbing even to the most grievous forms of the [mystery of evil] at work in the world."[176] But his empathy for victims of abuse was limited to a brief appeal to Catholics to "commit" to Christ "[a]s the Church shows her concern for the victims and strives to respond in truth and justice to each of these painful situations."[177] The Pope avoided words like "clergy sexual abuse" or "pedophilia," and critics wondered whether he understood the full extent of the American crisis.[178]

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174. MASS. GEN. LAWS ch. 119, § 51A (2002).

175. *See* Letter from Pope John Paul II to Priests for Holy Thursday (Mar. 17, 2002), *available at* http://www.vatican.va/holy_father/john_paul_ii/letters/index.htm (last visited Jan. 7, 2003).

176. *Id.*

177. *Id.*

178. *See* Michael Paulson, *Pope Decries 'Sins' of Priests*, BOSTON GLOBE, Mar. 22, 2002, at A1.

In contrast, some of America's Catholic leaders have expressed great remorse for the Church's improprieties; their willingness to deal openly with clergy sexual abuse offers hope for reform. In a letter published in *The Miami Herald*, Archbishop John C. Favalora recognized that:

> [t]he sexual abuse of children and young people by some priests and bishops has caused great pain, anger and confusion, and these feelings have been compounded by the inadequate ways in which some Catholic Church leaders have dealt with these terrible acts . . . . [He expressed] great sorrow and regret . . . for the suffering of victims of sexual abuse, their families and [the] Catholic community.[179]

Beyond showing sympathy, Bishop Wilton Gregory, President of the U.S. Conference of Catholic Bishops, encouraged priests who have engaged in sexual misconduct to "[r]eport this fact so that justice and the Church will be served, and [the priest] will be able to live honestly with [his] own conscience."[180] Confession and repentance, an integral part of the Christian faith, should also serve as cornerstones of the Church's legal defense.

If the Church genuinely wishes to respond "in truth and justice," then it must waive its right to assert the First Amendment as a shield to liability. It is unethical to preach confession and repentance in a house of God while practicing denial in a court of law. It is time for the Church to set down its shield. This is not war. Like the moment when King Henry II kneeled before Becket's casket, this is the time to repent.

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179. The Most Revered John C. Favalora, *Great Sorrow and Regret*, MIAMI HERALD, June 24, 2002, at 7B.

180. Donna Gehrke-White, *Abusive Priests Urged to Speak Up*, MIAMI HERALD, June 14, 2002, at 1A.