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SEXUAL MISCONDUCT AND ECCLESIASTICAL IMMUNITY

BY

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Sexual Misconduct and Ecclesiastical Immunity
Ira C. Lupu & Robert W. Tuttle¹

Forthcoming, Symposium on Church Autonomy
2004 Brigham Young University Law Review

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Introduction

History and human nature consistently teach us that leaders will disappoint their followers. Nowhere is this more likely to be true than in the case of religious leaders, who purport to speak in the name of God, and who address our deepest longings and fears. Humans, deeply aware of their own fallibility, will often project unreasonable expectations of perfection upon those who present themselves as spokespersons and leaders of communities organized around such ultimate concerns. This inevitable tendency to disappoint is amplified in our own time and place, in which the ubiquitous mass media endlessly parade the flaws, foibles, and faux pas of the prominent.

Even if the world were generous and forgiving towards those in leadership, however, the past few decades in general, and the past several years in particular, would have produced a massive decline in the status of clergy and those who supervise them. Episodes of sexual exploitation, and other breaches of trust, by members of the clergy are epidemic.² The scale of betrayal represented by these stories is more massive than most of us can absorb. And the tales are deeply aggravated by the follow-up accounts of religious supervisors who, having learned of such malfeasance, failed to take the proper steps to prevent recurrence.³ The combination of

² The best source for the massive media coverage of the phenomenon of sexual abuse by clergy of all faiths is the archive of stories maintained by the Poynter Institute of Journalism. The archive can be accessed at <http://poynter.org/column.asp?id=46>. For a detailed assessment of the media reports of sexual abuse and misconduct in the Catholic Church, see <http://www.bishopswatch.org/New/SexAbuseChart.htm>.

³ The story of supervisory failure is told in the most detail in the reports of the prosecutors who have considered indicting such supervisors. See, e.g., *The Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston: A Report by the Attorney General (Office of the Attorney General, Commonwealth of Massachusetts, released July 23, 2003)* (hereafter “Massachusetts AG Report”). See additional such reports from New Hampshire and Suffolk

misbehaving clergy and irresponsible supervision has widely expanded the scope of harms committed, the sheer number of victims, and the public outrage that has ensued.

Much, but by no means all, of this story has involved the sexual exploitation of children, which of course accentuates its horrors. Despite our cultural ambivalence about youth sexuality – posters of Britney Spears certainly claim as much public notice as accounts of abusive priests – the anger and sense of betrayal are at their headline-screaming strongest when children, especially the pre-pubescent, are the victims of such wrongs. The nationwide scandal involving the Roman Catholic Church, the wrongful behavior of some of its priests, and the repeat offenses facilitated by the conduct of those in its hierarchy of supervision have been deeply impressed upon the public consciousness. It will take several generations, a clean record, and a world of good deeds for the Church of Rome in the U.S. to regain the full measure of its institutional reputation.⁴

The legal fallout from the scandal of the Catholic Church may even be more widespread and enduring than the religious consequences.⁵ Priests have gone to prison for lengthy terms.⁶

County, NY, cited in note xx and Part III, *infra*.

⁴ In addition to the sources cited in notes 2-3, *supra*, see generally, Peter Steinfeld, *A People Adrift: The Crisis of the Roman Catholic Church in America* (2003). See also Catholics for a Free Choice, *Clergy Sexual Abuse: Out of the Shadows: A Shadow Report on the Holy See and the Convention on the Rights of the Child* (http://www.bishopswatch.org/Links/May_Shadow_report.pdf). A recent survey by the National Review Board, a panel of lay Catholics commissioned by the U.S. Conference of Catholic Bishops, reports that nearly 4500 Catholic priests – slightly under 5% of those who have been served as priests – have been accused of sexual misconduct over the past 50 years. Alan Cooperman, *Nearly 4500 Priests Accused of Abuse, Draft Report Finds*, *Washington Post*, Feb. 17, 2004, p. A2.

⁵ For predictions and concerns about that fallout, see Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal* (article based on The

Many courts have upheld tort claims against dioceses and their officers.⁷ In the process, many First Amendment defenses once thought likely to insulate defendants against such claims have been aggressively advanced and explicitly rejected.⁸ Many millions of dollars in legal settlements have been paid, and substantial church properties have been sold in order to pay the costs of such settlements.⁹ In several jurisdictions, prosecutors have empaneled grand juries to investigate the possibility of criminal wrongdoing by church leaders.¹⁰ Though no indictments for criminally neglectful or otherwise culpable supervision have yet appeared, prosecutors have

Brendan Brown Lecture at the Columbus School of Law, Catholic Univ. of America, Jan. 15, 2003) (copy on file with authors). Mr. Chopko is the General Counsel, United States Conference of Catholic Bishops.

⁶ Details of such incarcerations are included in the website list posted by Catholics for a Free Choice, see <http://www.bishopswatch.org/New/SexAbuseChart.htm>. John Geoghan, one of the more notorious of the abusers in the Archdiocese of Boston, was recently murdered in prison, while serving a 9-10 year sentence for sexual assaults on minors. See Richard Nangle & Kathleen A. Shaw, Geoghan is Killed in Prison, Shirley (Ma) Telegram & Gazette, Aug. 24, 2003, archived at <http://poynter.org/column.asp?id=46&aid=45500>. Catholic bishops have thus far escaped indictment in the scandal. See Alan Cooperman, Bishops Have Eluded Sex Abuse Indictments, Washington Post, June 4, 2003, p. A2.

⁷ See discussion and cases cited in Part III.A. and III.B, *infra*.

⁸ See discussion and cases cited in Part III.A. and III.B., *infra*.

⁹ The Archdiocese of Boston has recently settled a group of such lawsuits for a total of \$85 million, and is financing the settlement in part with proceeds from selling the estate that has long housed the Archbishop of Boston. See, e.g., Michael Paulson & Steve Bailey, BC eyes archdiocese land; loans for church seen, Boston Globe, Dec. 5, 2003 (archived at <http://poynter.org/column.asp?id=46&aid=56645>); see also Nancy Meersman, Diocese agrees to pay 6.5 million to settle sex-abuse cases, The Union Leader Sunday News, May 23, 2003 (reporting on settlement in Manchester, NH); add older news stories on Dallas settlement – see Chopko paper at 9; Add other jurisdictions.

¹⁰ See, e.g., Suffolk County Supreme Court Special Grand Jury, May 6, 2002, Grand Jury report CPL sec. 190.85(1)(c)), transcript released Jan. 17, 2003.

filed public reports that suggest criminal behavior of this sort has occurred,¹¹ and settlements with prosecutors have included terms that deeply involve the state in the process of clergy supervision.¹²

This problem, however, is not limited to the Roman Catholic Church,¹³ nor does it involve sexual misbehavior only toward minors. Other stories, made more complicated by the adult status and capacities of those who assert they have been wronged, nevertheless remain a significant part of the unfolding cultural and legal saga of sexual misconduct by clergy, as well as failures and wrongs by those who supervise these clergy. A large number of claims of legally actionable sexual exploitation and abuse, involving a wide variety of religious denominations, have arisen out of relationships between clergy-counselors and adult parishioners seeking

¹¹ In addition to the Massachusetts AG Report, see Peter W. Heed, N. William Delker, & James D. Rosenberg, Report on the Investigation of the Diocese of Manchester (NH), March 3, 2003 (Office of the New Hampshire Attorney General) (hereafter “New Hampshire AG Report”).

¹² Such agreements have been reached in Phoenix, AZ and Manchester, NH. We discuss the First Amendment questions raised by such agreements in Part III.C., *infra*.

¹³ Although the problems of the Catholic Church have dominated the news, the general phenomenon of sexual abuse by clergy is by no means limited to that faith community. See, e.g., Michael Paulson, All faiths question handling of abuse, *Boston Globe*, March 3/13/02, available on-line in the *Boston Globe* archives (referring to sexual abuse by clergy in many faiths, including Hare Krishna, Jehovah’s Witnesses, Roman Catholics, United Church of Christ, Episcopal Diocese of Massachusetts, Unitarian Universalist Association, American Baptists Churches of Massachusetts, Greek Orthodox Diocese of Massachusetts, and Orthodox Judaism). See also Julie Weiner, Sexual Abuse Case Broke Down Barriers, *Canadian Jewish News*, Aug. 23, 2001 (reporting on pattern of molestation of teenage girls by Orthodox Jewish rabbi); Stephanie Saul, Rabbis and Sex Abuse Accusations: Jewish Leaders Begin Struggle to Combat Problem, *Newsday*, May 26, 2003; Elizabeth Neff, Mom: Bishop Knew of Pedophile, *The Salt Lake City Tribune*, September 6, 2001 (reporting \$3 million dollar settlement of suit against Church of Jesus Christ of Latter-Day Saints), archived at <http://www.stopmormonsexualabuse.com>; Marion Smith, Blame the Victim: Hushing Mormon Sexual Abuse, April 10, 1996, <http://www.affirmation.org/artcle05.htm> (describing series of abuse cases and failure of LDS church authorities to take proper action against perpetrators).

counsel. Plaintiffs in these cases have asserted a range of theories of tort liability, including professional malpractice and breach of fiduciary duty on the part of the clergy-counselor. The same claims have been pressed up the chain of supervisory responsibility within religious denominations, and plaintiffs have asserted that supervisors in these circumstances have committed tortious acts of negligent training, supervision, retention, and assignment of clergy, as well as breaches of fiduciary duty owed by supervisors to members of the religious community.

The cases in which an adult is the victim have gotten less public attention than those involving children, and they typically do not raise the specter of criminal law violations. These cases do raise problems of the collision between tort law and the First Amendment immunities of clergy, denominational supervisors, and religious entities themselves. Indeed, the noncriminal quality of the wrongs in the cases involving adult victims may render the constitutional questions about immunities even more difficult. As the public and collective interest in clergy behavior becomes weaker, state intervention in the affairs of religious organization may become harder to justify. Here, too, however, the past several decades have witnessed a quite remarkable trend away from recognition of First Amendment defenses, and a judicial willingness to impose liability upon clergy – and their supervisors – at least as broad as the liability imposed upon analogous secular enterprises.¹⁴

¹⁴ See discussion and cases cited in Part III. ___, *infra*. In one additional (and less well-publicized) context, sexual misbehavior by members of the clergy has resulted in the erosion of an important and well-recognized legal immunity of religious institutions. For many years, the courts have recognized a “ministerial exception” to the law of employment discrimination and other features of the law governing the employment relation. See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). As we discuss in Part II, *infra*, such claims have been barred whenever adjudication of them would involve courts in superintending the evaluation of clergy performance by a faith community. Recently, however, several courts have recognized sexual harassment as an exception to this immunity. *Bollard v. California Province of the*

This paper will critically analyze the possibility and structure of First Amendment defenses to actions, both private and public, arising out of sexual misconduct by members of the clergy. Part I will trace the expansion of relevant theories of tort and criminal liability, and the waning of immunities, constitutional and statutory, that once applied to such actions. The legal developments associated with this trend include the general expansion of tort liability beyond primary wrongdoers to secondary actors and the enterprises for which they act; the erosion of charitable immunity once made broadly available by state law; and the changes in law triggered by heightened social awareness of the vulnerability of children, and of adults in counseling relationships, to sexual exploitation. The legal and cultural phenomena that animate these trends occur against the backdrop, which Part I also explores, of a comparable decline in the constitutional distinctiveness of religious institutions. This legally recognized loss of distinctiveness has facilitated the exposure of religious institutions to trends which otherwise might have bypassed such entities.

Part II of the paper suggests a normative theory of the constitutional distinctiveness of religion, and ties that theory to a particular conception of ecclesiastical immunity.¹⁵ Most

Society of Jesus, 196 F.3d 940 (9th Cir. 1999), rehearing denied, 211 F.3d 1331 (2000); *McKelvey v. Pierce*, 173 N.J. 26, 800 A.2d 840 (2002); *Black v. Snyder*, 471 N.W. 2d 715 (Minn. Ct. App. 1991). Sexual harassment claims, like tort claims against church leaders for misbehavior of clergy, may represent one more example of the erosion of ecclesiastical immunities under the pressure to make institutions account for sex-related wrongdoing by their agents.

¹⁵ For a broader conception of this immunity, see Douglas Laycock, *Toward A General Theory of the Establishment Clause: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981), Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984), Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. Rev. ____.

conceptions of such immunity represent assertions of the liberty of religious organizations, and are grounded in the Constitution's Free Exercise Clause. Our approach, however, is grounded in the Establishment Clause, and proceeds from a vision of jurisdictional limits on civil government. As we articulate in Part II, and elaborate in Part III, civil government possesses a jurisdiction that is limited to temporal matters; it is constitutionally disabled from addressing or asserting control over ultimate questions. From this vision we tease out implications for the immunity of religious institutions in resolving internal disputes and in selecting and training their leaders and spokespersons.

Part III of the paper then brings the lessons of Part II to bear on the particular problems of sexual abuse by clergy, and the criminal and civil liability of secondary actors and enterprises for such misconduct. Here, we analyze the particulars of tort claims frequently advanced by plaintiffs, and we offer guidelines to courts and criminal prosecutors, faced with such claims, about ways to reconcile the appropriate First Amendment norms with the details of clergy misconduct and theories of liability.

Woven into the fabric of Part III are three major themes. First, those who perpetrate sexual harms against children, or others who lack capacity to consent, have no claim of ecclesiastical immunity. Second, the religious status of persons, and the religious character of institutions should not give rise to fiduciary duties as a matter of law. In the application of the law of fiduciary duty, courts should take great care to avoid the imposition, by juries and others, of special, religion-distinctive liabilities upon clergy and religious institutions. The creation of such liabilities violates the constitutional prohibition on discrimination against religion as compared with its secular counterparts. Third, adjudication of wrongful acts in the hiring and

supervision of clergy must be conducted with sensitivity to constitutional concerns of both substance and process. The Establishment Clause forbids the state to use adjudication of tort claims as an instrument to effectively determine the structure of religious organizations. Borrowing from the law concerning First Amendment limitations on the tort liability of the press, we argue that liability of supervising institutions should be limited to cases involving an “intentional failure to supervise,” and that judicial processes should be tailored to maintain compliance with that standard.

I. The Decline of Ecclesiastical Immunity

At the beginning of the twentieth century, a person sexually molested by someone acting on behalf of a religious organization would not have contemplated legal action against the religious organization, and would not have been successful in such an action had she tried. By the beginning of the twenty-first century, however, a person who had suffered such an injury might well be a successful plaintiff in a suit against the wrongdoer, ecclesiastical officials, and the religious entity in which the individual defendants served.

How can we account for this dramatic change? As Professor Idleman has discussed, part of the answer rests in changing cultural norms.¹⁶ Members of religious communities have become increasingly willing to pursue legal claims against their religious community and its agents. Moreover, religious institutions, like many institutions, have seen their reputations decline, at least partly because of widely publicized scandals, both sexual and financial.

¹⁶ Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 *Ind. L.J.* 219, 240-242 (2000). Professor Idleman’s article is the germinal work on the late 20th century trend to expand the tort liability of religious entities.

These cultural shifts have paralleled, and perhaps even fostered, legal changes that have dramatically increased the exposure of religious organizations to liability. First, a general decline in the doctrine of charitable immunity has made possible a wide array of tort claims against religious organizations. Under this doctrine, which held sway in American courts from the late 19th through the mid-20th centuries, nonprofit organizations were not answerable for torts that they or their agents committed against beneficiaries of their services.¹⁷ By the early 1960s, charitable immunity was quickly eroding, especially with respect to medical malpractice claims against non-profit hospitals.¹⁸ In most states, the erosion had largely eliminated this immunity by the mid-1980s.¹⁹ Policy reasons for the shift are not hard to fathom: the culture had come to expect a legal remedy for nearly any injury, and institutions seemed better able than the injured

¹⁷ Tort Immunity of Nongovernmental Charities--Modern Status, 25 A.L.R.4th 517, 522-23 (1983). The doctrine of charitable immunity in American law originated out of court decisions applying two English cases, both of which had been overruled by the time of their adoption into American law. *McDonald v. Massachusetts General Hosp.*, 120 Mass. 432 (1876); *Perry v. House of Refuge*, 63 Md. 20, 26-28 (1884). The doctrine was eventually adopted by nearly all American jurisdictions, either by judicial decision or statute. Charitable immunity rested on a number of policy grounds, including a notion of implied trust limiting the uses of the organization's funds to its charitable purposes, and a theory that beneficiaries of such services implicitly waived their right to sue in tort over injuries suffered as a result of receiving the services. Bassett, *Religious Organizations and the Law*, §§ 7.2 - 7.6.

¹⁸ Most state courts dealt with these claims by creating an exception to charitable immunity for injured beneficiaries who paid a fee for the charity's services. *Morton v. Savannah Hosp.*, 148 Ga. 438, 440, 96 S.E. 887, 888 (1918) (holding that the only funds subject to tort judgments are those received from paying patients); *Bougon v. Volunteers of Am.*, 151 So. 797 (La. Ct. App. 1934); *Robertson v. Executive Comm. of the Baptist Convention*, 55 Ga. App. 469, 190 S.E. 432 (1937); *Lincoln Memorial Univ. v. Sutton*, 163 Tenn. 298, 302, 43 S.W.2d 195, 196 (1931).

¹⁹ By the beginning of 1986, thirty-three jurisdictions had abrogated the doctrine for some kinds of charities, and sixteen of the thirty-three had abandoned it altogether. See 25 ALR 4th at 525-27, 547.

parties to absorb – or to purchase insurance to cover – the costs of such injuries.²⁰

Second, the past century also witnessed a significant expansion in theories of tort liability, especially in the law’s willingness to hold supervisors and institutions liable for injuries inflicted by their agents.²¹ The earliest of these developments was the concept of vicarious liability, commonly referred to as *respondeat superior*, under which the employer is imputed liability for the tortious acts of its agent, when such acts fall within the scope of employment.²² Later developments in tort theory have expanded the employer’s non-vicarious liability for injuries caused by its agent, to include negligence in hiring, training, supervising, or retaining such agents

²⁰ Note, The Quality of Mercy: “Charitable Torts” and Their Continuing Immunity, 100 Harv. L. Rev. 1382, 1399 n.8 (1987). *President of Georgetown College v. Hughes*, 130 F.2d 810, 815 (D.C. Cir. 1942) (“The doctrine of immunity of charitable corporations found its way into the law . . . through misconception . . . of previously established principles.”) Though the doctrine of charitable immunity has certainly waned, special protections for charitable institutions remain in many jurisdictions. Very few states retain blanket immunity for charities, but many place monetary limits on charities’ exposure to tort liability, and even more extend immunity to individual volunteers of charities, for torts arising out of their work on behalf of the charity. See, e.g., *Connors v. Northeast Hospital Corp.*, 439 Mass. 469; 789 N.E.2d 129 (Mass. 2003) (applying Massachusetts law that imposes a \$20,000 cap on charities’ liability for tort damages, Mass. Gen. Laws ch. 231, § 85K (2002)). Other states restrict charities’ exposure to the limits of their liability insurance policy. See, e.g., [Maryland statute & case law on limited immunity] (New Jersey is notable for its maintenance of a strong doctrine of charitable immunity. The immunity of charitable institutions in New Jersey, however, does not extend to individuals who serve such entities. See, e.g., *F.G. MacDonell*, 696 A.2d 697 (N.J. 1997) (permitting lawsuit against priests for alleged breach of fiduciary duties owed to parishioner)). For our purposes, however, the rise or fall of charitable immunity is less important than its character as a religion-neutral doctrine. Where such protections remain, they are enjoyed by religious and non-religious charities alike; where abrogated, the same burden is borne by both religious and non-religious organizations.

²¹ W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 501-02 (5th ed. 1984).

²² See, e.g., Rhett B. Franklin, Comment: Pouring New Wine into an Old Bottle: a Recommendation for Determining Liability of an Employer under *Respondeat Superior* 39 S.D. L. REV. 570, 573-77 (1994) (discussing history of doctrine of *respondeat superior*).

– even when the alleged wrong, such as sexual abuse, occurs outside the scope of the agent’s employment but nevertheless is facilitated by the employment relationship.²³

Third, particularly in the last quarter-century, the law has become especially responsive to sexual violence, abuse, and exploitation²⁴. Such developments include prosecution of marital rape and date rape;²⁵ shield laws to protect rape victims in the legal process;²⁶ laws requiring the reporting of abuse of children, including sexual molestation;²⁷ prohibitions against sexual harassment in schools and workplaces;²⁸ and the imposition of tort liability and professional

²³ Restatement (Second) of Torts § 317 (Master’s liability for certain acts of servant even though acts fall outside the scope of servant’s agency). For discussion of liability for such negligent acts by supervisors employed by religious entities, see Part III B, *infra*.

²⁴ See generally R. Emerson Dobash & Russell P. Dobash, *Women, Violence, and Social Change* at 99-173 (1992) (on increased activism directed toward state responses to domestic sexual violence and abuse).

²⁵ See generally Susan Estrich, *Real Rape* 80-91 (1987) (discussing the reform of rape laws under which the scope of the crime is expanded).

²⁶ Fed. R. Evid. 412.

²⁷ Currently the following states have mandatory reporting statutes. (This list does not include those states that only require reporting post mortem.) Alabama, Ala. Code 26-14-3 (1975); California, Cal. Pen. Code 11166 (2000); Florida, Fla. Stat. ch. 39.201 (2003); Georgia, Ga. Code Ann. 19-7-5 (2003); Illinois, 325 Ill. Comp. Stat. 5/7.19 (2003); Iowa, Iowa Code 232.69 (2003); Kansas, Kan. Stat. Ann. 38-1522 (2001); Louisiana, La. Children's Code Ann. 609 (1995); Minnesota, Minn. Stat. 626.556 (2002); Montana, Mont. Code Ann., 41-3-101 (2000); Nebraska, Neb. Rev. Stat. 28-711 (1995); New Hampshire, 12 RSA 169-C:2 (2002); New York, N.Y. Pub. Health Law 2805-n (1999); North Carolina, N.C. Gen. Stat. 7B-301 (2001); Oregon, Or. Rev. Stat. 419B.010 (1993); South Carolina, S.C. Code Ann. 20-7-510 (1995); Utah, Utah Code Ann. 53A-6-502 (2000); Washington, Wash. Rev. Code 26.44.030 (2000).

²⁸ Sec. 703 of Title VII 29 C.F.R. 1604.11 (2000) (sexual harassment in the workplace); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (sexual harassment in schools). See *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding that a school district may be held liable for failure to respond adequately to peer sexual harassment

discipline on lawyers, physicians, and therapists who sexually exploit their clients or patients.²⁹

Notwithstanding these general developments in the law of tort or crime, one might expect that the Religion Clauses of the First Amendment would provide constitutional immunities for ecclesiastical authorities implicated in the wrongdoing of their agents. Indeed, if existing doctrines of church-state separation were generally robust, one would be surprised to see a rapid waning of such immunities. These lawsuits, after all, effectively empower judges and juries to evaluate the processes of assignment and supervision of clergy, and may coercively extract significant wealth from religious communities if state-empowered decision makers determine that the leaders of such communities have violated legal duties of care or loyalty.

The overarching constitutional regime of Separationism that once grounded First Amendment-based immunities for religious entities, however, has been shrinking. A Separationist regime depends entirely on a conception of the constitutional distinctiveness of religion and religious institutions. Thirty years ago, in Separationism's heyday, the Supreme Court stood firmly behind just such a conception. The Court's Separationism was rooted in both Religion Clauses of the First Amendment. With respect to the Establishment Clause, norms of

under Title IX).

²⁹ See, e.g., Model Rules of Professional Conduct, Rule 1.8(j) (2003) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced"); 740 ILCS 140/1 et. seq. (2004) (Illinois Sexual Exploitation in Psychotherapy, Professional Health Services, and Professional Mental Health Services Act, which imposes criminal liability on mental health professionals for sexual contact with patients). See also Scott M. Puglise, Note, "Calling Dr. Love": The Physician-Patient Sexual Relationship as Grounds for Medical Malpractice - Society Pays While the Doctor and Patient Play, 14 J.L. & Health 321 (1999/2000) (discussing malpractice liability of physicians who engage in sexual relationships with patients).

Separation included the prohibition on officially sponsored religious speech in public schools,³⁰ and a firm bar on direct financial assistance to “pervasively sectarian” institutions,³¹ including houses of worship and religious elementary and secondary schools. With respect to the Free Exercise Clause, the Court’s decisions suggested that state-imposed burdens on religious freedom are subject to strict and searching judicial examination, even if the burdens arise from laws of general applicability.³² And a line of decisions precluded the civil courts from adjudicating disputes concerning both property and personnel, arising from within a particular faith community.³³

By the turn of the millennium, several – though by no means all - of the building blocks in the edifice of Separationism had crumbled, and a competing paradigm of Neutrality or evenhandedness between religion and secularity, had taken center stage. These developments became manifest in a number of discrete moves in the Supreme Court. First, and foremost for

³⁰ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (officially sponsored Bible reading at start of public school day violates Establishment Clause); *Engel v Vitale*, 370 U.S. 421 (1962) (practice of starting each public school day with Regent’s Prayer violates Establishment Clause).

³¹ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The line of decision in which *Lemon* is prominent begins with *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

³² See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise clause supports exemption from affirmative duty of parents to send children to accredited school until the children reach the age of 16).

³³ See, e.g., *Watson v Jones*, 80 U.S. (13 Wall.) 679 (1871); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). This line of decisions, upon which we build in Part II.A., *infra*, stretches back in its origins to English common law. See generally Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843 (1998).

our purposes, the Court’s opinion in *Jones v. Wolf*³⁴ upheld the authority of lower courts to adjudicate internal church disputes in those situations in which religion-neutral legal principles permit judicial resolution without involvement in matters of theological principle or ecclesiastical structure. Second, in what has become a lengthy series of decisions, the Court has recognized the right of speakers with a religious perspective to have equal access to public fora for speech;³⁵ in these cases, time and again, the Court has rejected defenses based on a Separationist theory of the Establishment Clause. Third, in a development that shocked the world of lawyers and scholars, the decision in *Employment Division v. Smith*³⁶ narrowed or eliminated the Free Exercise doctrine calling for strict judicial evaluation of burdens imposed on religious freedom by religion-neutral, generally applicable legal norms. Fourth, Establishment

³⁴443 U.S. 595 (1979).

³⁵ *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

³⁶ 494 U.S. 872 (1990). The Supreme Court soon thereafter reaffirmed Smith’s controversial principle in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Congress attempted to legislatively “overrule” Smith in the Religious Freedom Restoration Act of 1993, but the Supreme Court held the Act unconstitutional as applied to the states in *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997). The legislative responses to Smith nevertheless continue. Congress, for example, has enacted the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. sec. 2000cc (2000), which specially protects the religious liberty of inmates in state institutions and the uses of land by religious entities. Constitutional challenges to RLUIPA have been working their way through the federal courts. See, e.g., *Madison v. Riter*, U.S. Court of Appeals, 4th Cir., No. 03-6363, 12/8/03 (upholding RLUIPA against Establishment Clause attack) contra, *Cutter v. Wilkinson*, No. 02-3270, 2003 WL 22513973 (6th Cir. , 11/7/03). See also Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 *Ind. L. J.* 311 (2003).

Clause constraints on the direct funding of activities by religious entities have withered.³⁷

This movement to Neutrality, though sweeping, has remained incomplete. First, the norms of Separationism have strengthened with respect to the government's own sponsorship of religious speech,³⁸ especially in the venue of the public schools.³⁹ Second, even with respect to direct financial aid to religious institutions, a robust prohibition remains on activity that would

³⁷ The ban on direct state funding of services at pervasively sectarian entities has been replaced by a considerably narrower (and hotly disputed) prohibition on state support for specifically religious activities. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000). For elaboration of this trend, see Ira C. Lupu & Robert W. Tuttle, *Government Partnerships with Faith-Based Service Providers: The State of the Law 2002* (Roundtable on Religion and Social Welfare Policy, Rockefeller Institute of Government). The lower courts have begun to notice this change. See *Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950 (WD Wisc. 2002) (invalidating contract between state and faith-based service provider because the contract financed faith-intensive treatment for substance abuse). And the Cleveland voucher decision has resolved the permissibility of indirect state financing, through mechanisms of beneficiary choice, of the provision of education by religious institutions, even if religious instruction and worship activities are included in such educational programs. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). For earlier incarnations of the beneficiary choice principle, see *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dept. of Services for the Blind*, 474 U.S. 481 (1986). The lower courts have noticed this too. In *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003), the Seventh Circuit upheld the participation in a beneficiary choice program of the same faith-based service provider that the U.S. District Court barred from participation in a direct financing scheme. (The state did not appeal the exclusion of the provider from the direct financing scheme). We analyze the significance of indirect financing in Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 *Notre Dame L. Rev.* 917 (2003), and Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 *J. L. & Politics* 537 (2002).

³⁸ *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

³⁹ The School Prayer cases of the early 1960's, which involved government-sponsored religious speech at the start of the school day, have been extended into moments of silence, *Wallace v. Jaffree*, 472 U.S. 38 (1985); commencement prayer at public schools, *Lee v. Weisman*, 505 U.S. 577 (1992); and school-sponsored student prayer at public high school athletic contests, *Santa Fe Ind. Sch. Dist v. Doe*, 530 U.S. 290 (2000).

render the government responsible for religious indoctrination by private parties.⁴⁰

Two additional doctrines, both highly significant for the set of problems to which this paper is addressed, also persist. The Court's doctrines about church-state entanglement, which have appeared in both Establishment Clause and Free Exercise settings, have been expressly reaffirmed,⁴¹ though they have not been applied in the Supreme Court with much rigor over the past fifteen years. Finally, constitutional limitations persist with respect to adjudication of matters internal to the structure and belief of religious institutions.⁴² Courts, as noted above, may apply religion-neutral principles to similarly neutral aspects of a religious entity's activities, but courts remain forbidden to resolve questions of religious structure or theological principle. Prominent in the context of internal disputes is the "ministerial exception" to employment law, which bars adjudication of most claims against religious entities with respect to decisions involving who shall be a spokesperson for the faith.⁴³ In all of these contexts – government speech, direct financial assistance to religious entities, areas of potential entanglement, and resolution of internal church disputes – courts continue to apply norms that are the product of a

⁴⁰ *Agostini v. Felton*, 521 U.S. 203 (1997). We explore this proposition in more detail in Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 *J. L. & Politics* 537 (2002), and Ira C. Lupu & Robert W. Tuttle, *Government Partnerships with Faith-Based Service Providers: The State of the Law 2002* (Roundtable on Religion and Social Welfare Policy, Rockefeller Institute of Government).

⁴¹ *Agostini v. Felton*, 521 U.S. 203, 2xx (1997).

⁴² The Supreme Court's opinion in *Emp. Div. v. Smith*, 494 U.S. 872 (1990) expressly preserved this line of authority, even as it was rejecting religion-specific exemptions in other contexts. *Id.* at 877. Kathleen Brady builds her contribution to this symposium on this dictum.

⁴³ See discussion at *infra* notes **-* and accompanying text.

view that religion and religious entities are constitutionally distinctive for some purposes.

What is the relevance of this distinct but incomplete movement from Separationism to Neutrality for questions of ecclesiastical immunity from tort liability? If that movement is ineluctably on its way to completion, and Separationism is a lingering but terminal patient, the answer has the character of prediction – religion-distinctive tort immunities have been disappearing, and they will continue to vanish to the point of zero. At the bottom of the slide, religious entities and their officers will have neither fewer nor greater defenses than those available to comparable secular organizations and their agents.

If, however, the trend away from a constitutional conception of religious distinctiveness has a normative stopping place, the answer to the question we pose about the future of ecclesiastical immunities may be very different. In a world in which, for a variety of legal and cultural reasons, the constitutional distinctiveness of religion has eroded, the blanket immunities once available to religious entities are gone for good. It remains to be asked, however, whether a normative defense might yet be mounted for a narrower, still vibrant version of Separationism, and whether such a defense would lead in turn to a more focused account of immunity for religious institutions and personnel with respect to certain categories of legal action. It is to such a normative theory, and its implications for issues of legal responsibility for clergy misbehavior, that we now turn.

II. The Remnants of Ecclesiastical Immunity

As we asserted in Part I, Separationism is built on a concept of the constitutional distinctiveness of religion and religious institutions. The constitutional doctrines supporting

Separationism, as a matter of Free Exercise, non-Establishment, or both, receded from the high water marks reached in the 1970's, because the characterization of religious beliefs, practices, or organizations as categorically distinctive from their secular counterparts became increasingly unpersuasive.⁴⁴ As Fred Gedicks, Larry Sager, Chris Eisgruber and others have argued, contemporary Western culture and values make a claim of overarching distinctiveness, and the corresponding demands for specialized legal treatment, impossible to sustain.⁴⁵

We have suggested elsewhere, however, that distinctiveness does not have to be an all or nothing proposition. Religion may indeed be distinctive for some constitutional or legal purposes, and not others, though we believe that the burden of persuasion should always be placed on the proponent of distinctive treatment.⁴⁶

More fundamentally, the relevant constitutional vision to be applied to these questions should not begin with an examination of religious belief, practice, or structure. Instead, proper constitutional understanding commences with an examination of the political and constitutional theory of the state. Here is our analysis of the question several years ago, offered in the Giannella Lecture at Villanova:⁴⁷

⁴⁴ We analyze the underpinnings of Separationism as a philosophy of the Religion Clauses in Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Institutions in Our Constitutional Order*, 47 *Vill. L. Rev.* 37, 51-65 (2001) (hereafter, "Distinctive Place").

⁴⁵ See, e.g., Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 *U. Ark. Little Rock L.J.* 555 (1998); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 *George Washington L. Rev.* 925 (2000); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245 (1994).

⁴⁶ Lupu & Tuttle, *Distinctive Place*, note xx *supra*, at 78-79.

⁴⁷ Lupu & Tuttle, *Distinctive Place*, note xx *supra*, at 83-84.

Quite paradoxically, a constitutionally sufficient answer to the question of religious distinctiveness cannot begin with theology or the sociology of religion. It must begin, instead, with a political concept of religion—one implicit in the founders' "novus ordo seclorum."⁴⁸ Hopes for this new order rested, in important part, on its limited horizon. The order would belong to "the ages," and its powers would be restricted to the temporal welfare of its citizens. Though each of them might (indeed likely would) have religious commitments, the state itself would have no religious confession to make. By thus circumscribing the government's jurisdiction, this new world order would avoid both conflict among religious factions for political authority and the inevitable despotism of the religious faction that won out. Seen in political terms, "religion" represents that which the new order disclaims: jurisdiction over ultimate truths, a comprehensive claim to undivided loyalty, and a command to worship. Separationism, then, depends on articulation of this political concept of sacredness and on some attempt to identify what particular aspects of the behavior of religious institutions are bound up with the sacred.

Understood this way, Separationism—a sense of boundary between state and some aspects of institutional behavior—functions much like the constitutional right of privacy, . . . [that is,] as a check on totalitarianism.⁴⁹ Totalitarian regimes typically try to control intimate aspects of their subjects' lives. Control of the intellectual, political, sexual, and economic details of the lives of political subjects creates enormous leverage for the state in the struggle for control of their spirits—their souls, if you will. If the right of privacy, at least in part, insulates the realm of the spirit from state control, the constitutional distinctiveness of religious institutions—those that nurture the spirit directly—rests on comparable foundations.

We concluded that Lecture with the following conceptualization of the state's role:⁵⁰

The role of the contemporary state is broad indeed, but it remains circumscribed by its penultimacy. Life's ultimate questions are to be left in private hands, and when those hands are institutional, the state must respect the internal life and self-governance of such institutions. Most importantly, our approach is consistent with the duality of roles of religious institutions in

⁴⁸ For further discussion, see Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985).

⁴⁹ For comparable assessment, see Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989) (asserting anti-totalitarian theory of privacy).

⁵⁰ Lupu & Tuttle, *Distinctive Place*, note xx supra, at 92.

contemporary America. When those institutions perform functions indistinguishable from other segments of the nonprofit world, the law should treat them as their secular counterparts are treated. When, however, religious institutions act in uniquely religious ways, making connections with the world beyond the temporal and material concerns that are the proper jurisdiction of the state, the legally distinctive qualities of such institutions begin to emerge. It is only by exploring the intrinsic limit on state power to affect these ultimate concerns, rather than by mining the desires, activities or teachings of religious organizations, that the distinctive place of religious entities in our constitutional order can be located.

Even if we are entirely correct that this vision of the state as a temporal entity accounts for constitutional norms of religious distinctiveness, we still need to articulate the details that follow from this insight. Issues of organizational commitment and leadership are obvious places to begin. If the state may mandate to a religious organization what its substantive commitments may include – for example, by dictating or limiting the contents of liturgical material – the state will have seized control of the organization’s vision of the ultimate. It is no surprise that the earliest American constitutions protected each citizen’s right to “worship God according to the dictates of his own conscience,”⁵¹ and such a guarantee remains at the core of any and every theory of the Religion Clauses.

The substantive freedom of religious communities to chart their own vision of divine order has supported a pair of corollary freedoms that continue to find religion-distinctive protection in decisions linked to both the Free Exercise Clause and the Establishment Clause.⁵²

⁵¹ See, e.g., Article II of the Massachusetts Constitution of 1780, reprinted in Michael S. Ariens & Robert A. Destro, *Religious Liberty in a Pluralistic Society* 49 (Carolina Academic Press). As Ariens and Destro recount, such a guarantee appeared in a variety of forms in almost every early American constitution, *id.* at 45-63. See also Thomas J. Curry, *The First Freedoms: Church & State in America to the Passage of the First Amendment* (1986).

⁵² Judicial decisions at times locate these doctrines of church autonomy in both Religion Clauses, see, e.g., *EEOC v. Catholic Univ. Of America*, 83 F.3d 455 (D.C. Cir. 1996), as do the

The first is the right to settle, free from state interference, internal disputes whose resolution depends upon judgments about theological principles or issues of religious polity. If ownership and possession of church property, for example, turns on fidelity to religious texts or principles, and competing factions within the church each assert that it is the only one faithful to church teachings, courts cannot possibly adjudicate between the parties without judicial resolution of the true meaning of the faith. It is this dilemma that has led American courts, first as a matter of common law⁵³ and now as a firm principle of constitutional law,⁵⁴ to defer to the resolution reached by the religious polity as organized by the faith community.⁵⁵

No comparable doctrine of absolute deference exists with respect to disputes within business organizations or secular, nonprofit organizations, all of whom may be held by courts to

organizers of this Symposium. For a variety of reasons explained below, it may matter greatly on which clause such doctrines rest. Because the Establishment Clause is a structural limitation on the role and power of the state, its prohibitions (unlike the rights protected by the Free Exercise Clause) may not be balanced against state interests and may not be “waived.” Officially sponsored prayer in public school, for example, is unconstitutional even if every parent of every child in the school gives explicit written permission to the state to sponsor such prayer. The Establishment Clause exists to keep the state out of the realm of ultimate concern, and private parties do not have authority to vest any such power in state institutions. For further exploration of the structural quality of the Establishment Clause, see Carl Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & Pol. 445 (2002).

⁵³ *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

⁵⁴ See, e.g., *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

⁵⁵ In hierarchical churches, judicial deference is to the hierarchical authority; in congregational churches, deference is to the congregational polity. Cases in which religious denominations are organized in a mix of hierarchical and congregational forms, as is typical of the Presbyterian Church, present the greatest difficulty for courts. See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). For discussion of these polity forms and their significance, see Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843 (1998).

comply with the substance of their founding legal documents.⁵⁶ For example, courts may resolve disputes among business partners according to the terms of a partnership agreement;⁵⁷ settle disagreements between majority and minority shareholders of a corporation according to the terms of a corporate charter;⁵⁸ and compel, in an appropriate action, a secular nonprofit organization to conform to trust instruments under which it has been operating.⁵⁹ Religious entities thus possess a degree of autonomy over the resolution of internal disputes unlike any other known to the law, and this autonomy may not be surrendered by contract or other act of consent to the exercise of state power. Courts may not rely on theological principles to resolve disputes, even if the parties so desire, and even if some immediate social good will be served thereby.⁶⁰

The second such corollary freedom is the right to designate leaders and spokespersons for the faith. Those in such positions are the authors of each faith community's continuing vision.

⁵⁶ For a comparable assertion, see John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. Rev. 1167, 1169 (2003) (hereafter cited as "Mansfield").

⁵⁷ *General Partnerships - Construction of Partnership Agreements*, 59A Am. Jur. 2d Partnership § 120 (2003).

⁵⁸ *Frankino v. Gleason*, No. 17,399, 1999 Del. Ch. LEXIS 219, at 12-14 (Del. Ch. 1999) (using contract interpretation principles to interpret a bylaw provision in a company's certificate of incorporation), *McNamara v. Frankino*, 744 A.2d 988 (Del. 1999); *Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 701 (Del. Ch. 1923) (noting that the terms of the contract between shareholders are determined by "the appropriate provisions of the certificate of incorporation and the law of the state").

⁵⁹ See Restatement (Second) of Trusts § 199(a) (1959).

⁶⁰ As Professor Mansfield argues, this limitation on civil courts may deprive religious entities of state assistance upon which others are free to call. Mansfield, note ** supra, at 1169.

They regulate its worship life, preside over changes in its liturgy and sense of values, and communicate its stories, beliefs, ethics, and sense of continuity from one generation to the next. State interference with the selection of leaders thus implicates the religious community's method of transmitting its vision, and cannot help but alter the content of the vision itself.

Here, too, the constitutional law of religious association protects the organizational interest in leadership selection, and does so more thoroughly and completely than it protects the comparable interests of secular associations. Although the matter has never come up directly, no one would doubt that the First Amendment precludes the state from instituting a system of licensure for the clergy. To do so would be to effectively impose a prior restraint on those who preach the Word, and to give the state control, through criteria of education, character, or otherwise, over those who would speak in the name of a religious community. The clergy may be a learned profession, like medicine, law, architecture or others, but the state may not create barriers to its entry. If a faith community chooses to ordain an illiterate ex-felon as its pastor, the state may not intervene or object.⁶¹

Quite consistently with the norm against state licensure of clergy, the Supreme Court has on a number of occasions ruled against claims that ask the judiciary to overturn the judgment of a religious institution with respect to a selection for church office.⁶² These decisions require the lower courts to categorically reject claims of breach of contract, or implied contract, to place or maintain a particular person in a religious office against the will of a religious organization.

⁶¹ See Mark Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. Rev. 1089, 1112-1113 (2003).

⁶² *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

As an outgrowth of these decisions, the lower courts for many years have applied a doctrine of “ministerial exception” to a broad variety of norms that otherwise govern the employment relation. With respect to employees in a position of spokesperson for the faith – member of the clergy,⁶³ professor of theology⁶⁴ or canon law,⁶⁵ director of religious music,⁶⁶ and other positions, defined by function rather than title – religious organizations are immune from claims that would entail judicial evaluation of an employee’s performance or a prospective employee’s qualifications.

The ministerial exemption is strikingly broad in its immunizing scope. For example, in its application to the law prohibiting sex discrimination in employment, the exemption is not limited to religious institutions that explicitly assert a preference for males over females for clergy positions. The exemption extends to all claims of sex discrimination in the hiring or conditions of employment of clergy, including assertions that a religious organization that

⁶³ *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (construing Title VII, 42 U.S.C. sec. 2000e, of the 1964 Civil Rights Act to exclude religious bodies, hiring for positions of religious significance, from the statutory prohibition on gender discrimination); accord, *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (reaching same result as *McClure* on constitutional grounds. The most prominent commentary on the ministerial exception remains Bruce Bagni, *Discrimination in the name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514 (1979). One of the authors of this article has been highly critical of the ministerial exception, see Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391 (1987). See Lupu & Tuttle, *supra* note xx, at 90, n. 177.

⁶⁴ *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982).

⁶⁵ *EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996) (church-controlled university constitutionally and statutorily immune from suit for sex discrimination in the refusal to tenure female professor of canon law).

⁶⁶ *EEOC v Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000).

purports to comply with norms of sex equality has covertly engaged in sex discrimination under the pretext of some sex-neutral policy.⁶⁷ To permit adjudication of such pretext claims, courts have consistently ruled, would be to invite judicial second-guessing of institutional judgments about the performance of agents in leadership roles.

Here, too, as in the case of broad immunity from judicial determination of theological principle to resolve intrafaith disputes, no comparable doctrine of immunity exists with respect to leadership positions in other organizations, nonprofit or otherwise. Perhaps, as a matter of freedom of association, the NAACP may reserve its presidency to African-Americans. Can we imagine, however, that courts would be barred from adjudicating a claim of race discrimination against such an organization if it held itself out as hiring on a nondiscriminatory basis? Nothing in American law would support such a claim.⁶⁸

For reasons that we develop below, the regime of legal immunity for intrafaith disputes and for personnel matters involving spokespersons for the faith has quite properly survived the

⁶⁷ Virtually every case of application of the ministerial exception takes this form. For a recent example, see *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000). We analyze *Gellington*, and the generic problem it presents, in considerable detail in *Lupu & Tuttle, Distinctive Place*, note xx *supra*.

⁶⁸ The Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), protects the associational freedom of private, noncommercial groups to impose leadership (or membership restrictions free from interference by the state's laws against discrimination. Nothing in *Dale*, however, suggests that the Scouts (or any other comparable group) could take the position that it treated heterosexuals and homosexuals equally, but that it should remain free from state inquiry into whether it behaved in fidelity to its commitment to nondiscriminatory treatment. There are, of course, special difficulties associated with applying civil rights norms to high level executive positions. See generally Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 *Harv. L. Rev.* 945 (1982). In his comment in this symposium, Professor Sager argues that the ministerial exception should be grounded in a right of intimate association. We doubt, however, that concerns of intimate or private association can successfully account for the scope of the current doctrine.

demise, decreed by *Employment Division v. Smith*,⁶⁹ of a more general doctrine of religious exemptions. *Smith* held that religiously motivated claimants did not have a right under the Free Exercise Clause to remain exempt from religion-neutral, generally applicable laws.⁷⁰ The laws of property, contract, and economic association that permit state resolution of intra-organizational disputes are indeed religion-neutral and generally applicable. The *Smith* opinion, however, explicitly recognizes the legal immunity of religious organizations from processes of civil adjudication that involve determinations of issues of religious principle or structure.⁷¹

Nor have the courts backtracked from the ministerial exception in the wake of *Smith*. In *Equal Employment Opportunity Commission v. Catholic University of America*,⁷² a leading and widely cited decision from the U.S. Court of Appeals for the District of Columbia, the panel expressly reaffirmed the ministerial exception in the face of an argument that it should not survive *Smith*. The decision affirmed a district court ruling that constitutional immunities barred adjudication of Sister Elizabeth McDonough's complaint that unlawful sex discrimination had infected the denial of her tenure application in the Department of Canon Law at Catholic University.

The *Catholic University* decision is worth noting in some detail. It is a thorough, well-developed opinion by a prominent court on the scope of the ministerial exemption, and the continued vitality of the constitutionally distinctive immunity created by the exemption. Sister

⁶⁹ 494 U.S. 872 (1990).

⁷⁰ *Id.* at xxx.

⁷¹ *Id.* at 877.

⁷² 83 F.3d 455 (D.C. Cir. 1996).

McDonough's tenure application had gone through a series of petitions and appeals to the faculty of Canon Law, the Committee on Appointments and Promotions of the University's School of Religious Studies, and a comparable committee of the University's Academic Senate. The process went on for over a year, ending with the Senate Committee's unanimous vote against a tenure recommendation. The Committee's primary reason for its decision was that "[t]he scholarship of the candidate does not measure up to the standards expected in the field for the granting of tenure."⁷³

Sister McDonough filed a complaint with the EEOC, alleging unlawful sex discrimination. The Commission undertook a two-year investigation and made unsuccessful efforts at conciliation. The EEOC and Sister McDonough thereupon brought suit against the University, and the case eventually went to trial. The University did not raise the ministerial exception as a defense. A week into the trial, after hearing competing expert testimony on the quality of Sister McDonough's scholarship compared to that of men who had been granted tenure in the Canon Law Department at the University, District Judge Oberdorfer asked the parties to brief the question of constitutional immunity. After they did so, he dismissed the case, holding that Sister McDonough's role in instructing members of the Catholic clergy in Canon Law made her functionally equivalent to a minister, and that the Free Exercise Clause therefore barred review of the decision.⁷⁴ He also ruled that the Establishment Clause barred adjudication of her

⁷³ Id. at 459. The Committee also stated that the candidate had made a contribution to "service and the practice of canon law," but that this did not "counterbalance the marginal performance in teaching and scholarly publications;" and that the divided vote in other voting groups that had reviewed on her application did not give sufficient assurance that Sister McDonough possessed the "optimal qualifications for the position." Id.

⁷⁴ EEOC v. Catholic Univ. of America, 856 F. Supp. 1, 11 (D.D.C 1994).

claim, because it required impermissible judicial evaluation of the merits of scholarship in Canon Law, a theological subject, and because the EEOC investigation itself involved impermissible procedural entanglement between the government and a religious institution.⁷⁵

On appeal, the D.C. Circuit Court synthesized Supreme Court decisions on intrafaith disputes and lower court decisions applying the ministerial exemption, and focused on what it saw as the central issue in the case – whether a Professor of Canon Law at Catholic University would have “essentially religious” functions.⁷⁶ Emphasizing her role as an instructor in the ecclesiastical law that “governs the Church’s sacramental life, [and] defines the rights and duties of its faithful and the responsibilities of their pastors,”⁷⁷ Judge Buckley’s opinion concluded that her primary duties would consist of teaching and spreading the faith. The Court buttressed its conclusion with an emphasis on the particular role played by Catholic University, whose Canon Law Department “is the sole entity in the United States empowered by the Vatican to confer ecclesiastical degrees in canon law.”⁷⁸ Moreover, the great majority of graduate degrees awarded by the Department over the ten years preceding the litigation had been conferred upon priests or members of religious orders, a fact which led the Court to conclude that the Department played a central role “in the graduate education of American priests.”⁷⁹

Having analyzed in close detail the functions of Sister McDonough’s position and the role

⁷⁵ Id. at 12.

⁷⁶ 83 F.3d at 463-65.

⁷⁷ Id. at 464.

⁷⁸ Id.

⁷⁹ Id.

of Canon Law at both Catholic University and in the Church as a whole, the Court affirmed the dismissal of the case. It concluded that the Free Exercise Clause (even after *Smith*) protected the University against a court substituting its judgment for that of University agents on the merits of Sister McDonough's scholarship, and that the Establishment Clause prohibited the kinds of substantive and procedural entanglement that had been produced by EEOC investigation and district court litigation, including discovery and trial.⁸⁰

The opinion in the *Catholic University* case is noteworthy in several respects. First, it quite appropriately parsed the functions of the job to see if it was religiously distinctive; had Sister McDonough been a professor of mathematics, the school presumably would not have had a comparable immunity. Second, it approvingly noted the district court's *sua sponte* focus on the ministerial exception and the questions of forbidden entanglement; these concerns relate to the subject matter jurisdiction of the courts, and cannot be waived by the parties' willingness to litigate. Whatever institutional reasons may have moved the University to contest Sister McDonough's claim of sex discrimination on its merits, this civil courts may not render

⁸⁰ The Court also held that the Religious Freedom Restoration Act still applied to the federal government, and that it too required dismissal of the action. *Id.* at 467-69. A concurring opinion by Judge Henderson, *id.* at 470-76, expressed the view that the district court, by careful management, might have remained within the Constitution and still assessed whether the school's determination about Sister McDonough's scholarship had been a pretext for sex discrimination. Judge Henderson believed that the district court should have limited itself to the evidence of scholarly quality that had been considered by the University's reviewing Committees, and not taken outside, expert testimony from ecclesiastical sources on the quality of the work. Judge Henderson concurred in the result, however, on the ground that the remedies sought by Sister McDonough, including reinstatement with tenure, would interfere with the final authority of the Vatican to appoint tenured professors in the Canon Law Department at Catholic University. *Id.* at 476.

judgments on theological questions.⁸¹

We believe that the result reached by the D.C. Circuit in *Catholic University* is correct, but that the court – like virtually every other court that has confronted questions of ecclesiastical immunity – misanalyzed the problem in one critically important respect. Ecclesiastical immunities, including the ministerial exception, are not the offspring of “rights” in the conventional sense. They are not the legal entitlements of religious entities in the way that, for example, authors and political advocates possess rights to communicate. Instead, ecclesiastical immunities should be understood as the entailments of the jurisdictional limitations imposed by the Establishment Clause on the state’s role.⁸² Because the state is forbidden from being the author or co-author of religious faith, it may not adjudicate or regulate the ways in which communities of faith are organized. Nor may the state select the voices by which such communities are led, or its lessons communicated. This jurisdictional limitation, which we believe resides most comfortably in the Establishment Clause (even as it furthers Free Exercise values), may not be waived by religious entities – hence the district court judge’s correct decision to stop the trial on the merits of Sister McDonough’s claim. Nor is the limitation subject to being set aside by state assertion of countervailing state interests, compelling or otherwise. The

⁸¹ The least well explained element in *Catholic University* is the assertion of some procedural concern about “excessive entanglement” independent of the substantive merits of the ministerial exception. *Id.* at 466-67. The question of procedural entanglement is one that is omnipresent in the process of discovery and trial in tort cases involving claims of sexual misconduct and defenses of ecclesiastical immunity, and we shall return to it in the next part of this paper.

⁸² For elaboration of this view, see Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *Iowa L. Rev.* 1 (1998); Carl Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, XIII *Notre Dame J. of Law, Ethics, & Pub. Pol.* 285 (1999).

Catholic University decision remains correct, regardless of the weight to be assigned to the governmental interest in combating sex discrimination in employment.

One additional development in American law sheds further light on ecclesiastical immunity, and reinforces our perception of the constitutional underpinnings of that immunity. About twenty years ago, in *Nally v. Grace Community Church*,⁸³ a California court awarded judgment against a pastor and his church to a family whose son had committed suicide after undergoing a series of counseling sessions with the pastor. The theory of the litigation was clergy malpractice; i.e., that members of the clergy were legally obliged to follow objective standards of care in counseling parishioners, and that this pastor had failed to follow such standards. A California appellate court soon thereafter reversed the judgment, on the theory that the First Amendment precludes civil judges and juries from deciding what standards of care a reasonably prudent and trained clergyman should follow. The court reasoned that any such inquiry would inevitably take judges and juries into the heart of theological arrangements, and would inevitably be biased against non-mainstream faiths.⁸⁴ Since *Nally*, almost every American court that has been presented with a claim for clergy malpractice – i.e., a claim that requires civil authorities to articulate and apply objective standards of care for the communicative content of clergy counseling – has rejected the claim on grounds of ecclesiastical immunity.⁸⁵

⁸³ *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984).

⁸⁴ *Nally v. Grace Community Church of the Valley* ("Nally III"), 763 P.2d 948 (Cal. 1988).

⁸⁵ See Bassett, *Religious Institutions and the Law*, § 8:19, n.9 (listing cases). The one exception seems to be *Byrd v. Faber*, 57 Ohio St. 3d 56, 565 N.E.2d 584 (1991), which leaves open the possibility of a clergy malpractice claim (though the court does not allow such a claim in this case). The quickly aborted development of the tort of clergy malpractice does not imply

In a number of recent lawsuits arising out of alleged sexual misconduct, the defendant religious organizations have asserted as defenses some version of ecclesiastical immunity.⁸⁶ Defendants have claimed that the disputes are “internal,” and therefore beyond the reach of judicial resolution. Defendants have at times asserted that tort claims arising out of sexual misconduct of clergy inevitably implicate the policies behind the “ministerial exception,” because the adjudication of such claims involve questions about the ordination, assignment, supervision, and retention of such clergy. Some courts have been receptive to blanket claims of immunity, but many have not.⁸⁷ And at least one academic commentator, writing from within the Catholic tradition, has begun to worry that broad assertions of immunity from tort claims against supervisors and religious entities will not only fail, but will poison the well in ways that

that clergy – and their supervisors - are perpetually safe from liability for their performance as counselors. As we document and assess in Part III of this paper, a substantial number of clergy, and a smaller but significant number of their supervisors, have been held liable for sexual exploitation in counseling relationships with adult parishioners. The courts that have affirmed imposition of such liability have based their rulings on a theory of fiduciary duty, which some – but by no means all – courts assert is an approach that avoids the constitutional pitfalls associated with the tort of clergy malpractice. For now, we hold this question for the general discussion in Part III, below.

⁸⁶ See, e.g., *J.M. v. Minnesota Dist. Council of Assemblies of God*, 658 (N.W.2d 589) (Minn. Ct. App. 2003).

⁸⁷ Compare *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (permitting negligent employment claim against church arising out of pastor’s molestation of child) with *Bryan R. v Watchtower Bible & Tract Soc’y*, 738 A.2d 839 (Me. 1999) (holding that the First Amendment bars such claims against religious institutions). We discuss these trends, and cite cases supporting them, in Part III. ___, *infra*. Professor Idleman’s important work also documents such trends in detail. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 *Ind. L.J.* 219 (2000).

render courts deeply resistant to more reasonable assertions of ecclesiastical immunity.⁸⁸

Cases involving sexual misconduct by clergy, especially those that include criminal sexual assaults on children, implicate the state's legitimate and deep concerns to protect the bodily and psychic integrity of its citizens. Additional inquiries into how such clergy came to have repeated opportunities for such exploitation and misconduct inevitably trigger the same concerns. When such inquiries, however, reach beyond the offending clergyman⁸⁹ to the substance and process of clergy selection, assignment, and retention, they cannot help but touch the institutional arrangements and theological understandings that inform the structure of faith communities and their leadership.

The tensions between protecting innocent victims of sexual misconduct and the policies that inform ecclesiastical immunities for distinctively religious activity are palpable. How can they be resolved? The conventional but thoroughly unproductive way to approach this problem is by way of a regime of exemptions, based on the Free Exercise Clause, from generally applicable norms of tort and criminal law. For a variety of reasons, this approach is a dead end. First, religious actors and institutions never claim that the sexual misconduct itself is religion-based. As a result, courts quickly repudiate any notion that religious liberty requires consideration of an exemption for such behavior. Second, the regimes of *Employment Division v*

⁸⁸ See Angela Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. Rev. 1031, 1054-55 (2003).

⁸⁹ We believe that we have looked at every case ever decided by an American court involving sexual misconduct by a member of the clergy. To our knowledge, all but one of the allegedly offending clergy in these cases have been men. The sole exception is found in *Barquin v. Roman Catholic Diocese of Burlington*, 839 F. Supp. 275 (D. Vt. 1993 (alleging sexual abuse of a child by an unnamed Sister Jane Doe)).

Smith and *Jones v. Wolf* appear to intersect in a focus on “neutral principles,” meaning principles that do not single out religion for disfavored treatment. Even though *Smith* appears to preserve a realm of church autonomy for resolution of internal disputes, it is all too easy to distinguish cases of property and contract, which involve voluntary private ordering, from cases of tort and crime, which involve coercive harm to third parties. *Smith* repudiates any exemptions for religious actors from general rules in this latter category. Third, even if *Smith* were overruled, the state has compelling interests in preventing predatory sexual behavior. Moreover, the relevant law of tort and crime is sufficiently well-tailored to that end that courts are unlikely to narrow the ambit of such rules in the name of free exercise.

Does the failure of the model of free exercise exemptions mean the death of ecclesiastical immunities from law designed to control sexual misconduct? Two important possibilities lead us to think otherwise. First, the Free Exercise Clause protects religious actors and institutions against discrimination in both the content of the law and its application. Second, jurisdictional limits on the state, as manifest in the ministerial exemption cases and the universal rejection of the tort of clergy malpractice, suggest boundaries on the application of criminal and tort law to the structure of clergy supervision. In Part III, below, we work out the implications of these two possibilities.

III Sexual Misconduct and Ecclesiastical Immunity

Civil and criminal actions involving sexual abuse by religious leaders involve many different kinds of claims and charges. Some arise specifically from the sexual misconduct itself, while others arise out of the religious organization’s duties to avoid or respond to such

misconduct. In this Part, we focus first on those claims and charges that relate most narrowly to the act or acts of sexual abuse, including criminal charges of sexual assault and civil actions for breach of fiduciary obligations. We then turn to the broader assertions of liability made against the wrongdoer's religious organization and officials, which include civil claims for breaches of institutional fiduciary duty, negligent hiring or supervision, and perhaps criminal charges for failure to protect children.

A. The Wrongdoer's Criminal and Civil Liability for Sexual Misconduct

Every American jurisdiction criminalizes, and makes tortious, sexual contact with persons below a specified age of consent.⁹⁰ Ecclesiastical immunity has never barred criminal prosecution or civil actions for a religious leader's violation of these laws. The reasons are obvious. Few would be willing to defend such conduct by claiming that their religious commitments included sexual interaction between adults and minors, or that a government investigation into such interaction would impermissibly entangle the state in religious matters. Were such defenses raised, courts would emphatically reject them on grounds that the public interest in protecting children vastly outweighs any claim of religious privilege, and that investigation and adjudication of the sexual abuse of children can proceed without state intrusion into questions of religious doctrine or governance.

In some circumstances, sexual contact with adults presents equally simple cases. If the

⁹⁰ In many states, the age at which a minor may legally consent to sexual relations is higher when the relationship is with a person in a position of trust and authority. See, e.g., Colorado Rev. Stats. §§ 18-3-405 & 18-3-405.3 (prohibiting sexual contact with a child under the age of fifteen, except when person having contact is in a position of trust, in which case the age of consent is eighteen). See also *Bohrer v. DeHart*, 943 P.2d 1220, 1227 (Co. App. 1996) (discussing Colorado provision on sexual assault on a child by a person in a position of trust).

sexual contact involves physical coercion, or the adult lacks full mental capacity to consent, then both criminal and civil norms will condemn the conduct.⁹¹ As with sexual abuse of children, ecclesiastical immunity offers no shelter to a religious leader who has violated these norms.

In the absence of physical coercion, however, sexual relationships between religious leaders and mentally competent adults present significantly more complicated issues. Consensual sexual conduct between competent adults does not generally give rise to criminal or civil liability. The torts of seduction and criminal conversation, under which a paramour could be sued for luring a woman into a sexual relationship, are long dead in most jurisdictions.⁹² Our legal analysis in this section, then, turns on a fundamental question: what makes sexual interaction between a clergyman and congregant different than an ordinary, non-actionable, consensual sexual relationship between two adults?

The standard answer to that question identifies the clergy-congregant relationship as “special,” one that imposes heightened obligations on the clergyman not to exploit parishioners

⁹¹ See, e.g., Minn. Stat. § 609.344(1)(d) (2003) (prohibition on sexual contact with mentally impaired person).

⁹² See, e.g., *Strock v. Pressnell*, 38 Ohio St. 3d 207, 212-13, 527 N.E.2d 1235, 1240 (Ohio 1988) (discussing amatory actions and the reasons why such actions have largely been abolished, and collecting cases and statutory provisions from other jurisdictions that have abolished such actions). Many states have abolished amatory actions by statute. Ala. Code § 6-5-331 (1975); Colo. Rev. Stat. § 13-20-202 (1987); Del. Code Ann. tit. 10, § 3924 (1974); D.C. Code Ann. § 16-923 (1981); Mont. Code Ann. § 27-1601 (1995); Ohio Rev. Code Ann. § 2305.29 (Anderson 1995); Va. Code Ann. § 8.01-220 (Michie 1992); Wyo. Stat. § 1-23-101 (1977). See generally Gregory L. Thompson, Note, *The Suit of Alienation of Affections: Can its Existence Be Justified Today?*, 56 N.D. L. Rev. 239, 243 (1980); *Alienation of Affections and Criminal Conversation Revisited*, 26 Pepp. L. Rev. 61 (1998) (explaining the history of the amatory torts). See also Richard A. Posner, *Sex and Reason* 81 (1992) (discussing civil remedies for sexual offenses).

under his care.⁹³ The special quality of this relationship may arise from the clergyman's practice of professional techniques that are essentially secular, rather than from his religious role.⁹⁴ In most jurisdictions, psychotherapists, social workers, and others who hold themselves out as secular counselors face tort liability, criminal responsibility, and professional discipline for sexual exploitation of their patients.⁹⁵ When clergy publicly advertise their availability to provide such counseling, perform the counseling in clinical settings similar to those of a secular counselor, and receive payment for rendering the service, they invite the broader community to apply to them the standards imposed on others similarly trained. If a pastor provided medical services – as a trained and licensed physician – in addition to her duties as a pastor, and was alleged to have negligently set a broken arm, no court would take seriously a claim for ecclesiastical immunity from medical malpractice.⁹⁶ There is no more justification for recognizing such immunity for a pastor who practices secular therapy.

⁹³ See generally Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 *Denver U.L. Rev.* 1, 37-48 (1996) (arguing that relationship between clergy and congregant is fiduciary in character, and sexual contact within the relationship is a breach of the fiduciary's duty).

⁹⁴ See, e.g., *Sanders v. Baucum*, 134 F.3d 331, 336-37 (5th Cir. 1998) (Court upheld claim against clergy for professional negligence in his practice of essentially secular marriage counseling).

⁹⁵ See, e.g., Minn. Stat. §§ 609.345(h)-(j) (2003) (criminal prohibition on sex between mental health practitioners and their patients). See also *id.* at § 1 (extending criminal prohibition to sexual contact between clergy and congregant, when sex arises from counseling relationship).

⁹⁶ *Dausch v. Rykse*, 52 F.3d 1425, 1433 (7th Cir. 1994) (...today, religious groups offer their adherents, and sometimes the entire community, services that were not offered by ecclesiastical sources in the past. Few would doubt, however, that a lawyer practicing in a legal clinic operated by a church or a physician practicing in a clinic under church auspices would have to comply with the same standards of professional care and responsibility as any other law firm or medical facility”).

Claims of sexual misconduct by secular counselors typically sound in professional negligence – malpractice – on the theory that a therapist has mishandled the strong emotional bonds that often arise between therapist and patient.⁹⁷ To the extent that a clergyman has undergone training in secular modes of therapy, held himself out as qualified to perform such therapeutic techniques, and induced a patient to rely on that expertise, the clergy-counselor should be held to answer for therapeutic malpractice in that vocation as well.⁹⁸

With few exceptions, however, courts have been unwilling to impose malpractice liability on clergy-counselors.⁹⁹ This unwillingness can be traced back to the landmark case of *Nally v. Grace Community Church of the Valley*.¹⁰⁰ In *Nally*, as we discussed above, plaintiffs alleged that their son had received negligent pastoral counseling at the church, and that the pastors' negligence was responsible for their son's suicide. After an intermediate appellate allowed plaintiffs to sue on a theory of clergy malpractice, the California Supreme Court reversed, holding, among other things, that imposition of malpractice liability for negligent pastoral counseling would involve the court in judgments about the "religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."¹⁰¹

⁹⁷ Id. at 1435; *Mullen v. Horton*, 46 Conn. App. 759, 764-66, 700 A.2d 1377, 1380-81 (Conn. App. 1997). See also *Villiers*, supra note **, at 43-45.

⁹⁸ *Sanders v. Baucum*, 134 F.3d 331, 337-38 (5th Cir. 1998).

⁹⁹ See, e.g., *Destefano v. Grabrian*, 763 P.2d 275, 283-86 (Colo. 1988) (In suit over sexual misconduct of pastoral counselor, court permitted breach of fiduciary duty claim, but rejected plaintiff's claim of malpractice in counseling).

¹⁰⁰ 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), cert. denied 490 U.S. 1007 (1989).

¹⁰¹ 47 Cal. 3d at 299.

Courts have good reason to reject claims of clergy malpractice when such claims invite the court to determine the standard of pastoral care for a “reasonable Catholic priest” or a “reasonable Orthodox rabbi.” These are judgments that can only be made from within the religious tradition, and are precisely the kind of judgments barred by the doctrine of ecclesiastical immunity.¹⁰² In *Nally*, the church and its pastors did not advertise their competence to perform secular therapy, but instead offered thickly religious counseling.¹⁰³ The court held that it could not adjudicate plaintiff’s claim without determining a standard of care for “reasonable spiritual counseling,” and that the Constitution prohibits such a determination.

In order to avoid the need for a court to find a standard of care for the “reasonable clergyman,” plaintiffs and courts have looked to the law of fiduciaries as an alternative legal basis for recognizing the special relationship between clergy and congregant. In *Destefano v. Grabrian*,¹⁰⁴ the leading case involving a priest’s sexual relationship with a woman he was counseling, the Supreme Court of Colorado rejected plaintiff’s claim of clergy malpractice, but found that she could proceed on a theory that the priest had breached his fiduciary duty to her:

Edna's first claim for relief alleges that Grabrian, in his position as a priest and as one who holds himself out to the community as a professional or trained marriage counselor, breached his fiduciary duty to her. A fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking. A fiduciary has a duty to deal “with utmost good faith and solely for the benefit” of the beneficiary. . . . A fiduciary's obligations to the beneficiary include, among other things, a duty of loyalty, . . . a

¹⁰² Id. See also *Schmidt v. Bishop*, 779 F. Supp.321, 326-28 (SDNY 1991), *Roppolo v. Moore*, 644 So.2d 206, 208-10 (La. App. 1994), *Strock v. Pressnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235, 1239 (Ohio 1988).

¹⁰³ *Nally*, 47 Cal. 3d at 284-87.

¹⁰⁴ 763 P.2d 275 (Colo. 1988).

duty to exercise reasonable care and skill, . . . and a duty to deal impartially with beneficiaries

A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relationship. . . . We have no difficulty in finding that Grabrian, as a marriage counselor to Robert and Edna, owed a fiduciary duty to Edna. His duty to Edna was “created by his undertaking” to counsel her. Grabrian had a duty, given the nature of the counseling relationship, to engage in conduct designed to improve the Destefanos’ marital relationship. As a fiduciary, he was obligated not to engage in conduct which might harm the Destefanos’ relationship. If the allegations are true, it is clear to us that Grabrian breached his duty and obligation when he had sexual intercourse with Edna.¹⁰⁵

The *Destefano* court also held that Grabrian had no plausible constitutional defense to the breach of fiduciary claim, because the alleged misconduct is “not an expression of sincerely held religious belief.”¹⁰⁶

Three aspects of the *Destefano* court’s fiduciary analysis suggest constitutional weaknesses in this approach. First, the *Destefano* court limits its constitutional analysis to the Free Exercise Clause, and summarily dismisses any defenses based on that clause because “the alleged wrongdoing of [the] cleric clearly falls outside the beliefs and doctrine of his religion.”¹⁰⁷ As we discussed above, courts and litigants too frequently mischaracterize the constitutional roots of ecclesiastical immunity, which rest not in an individual’s claim of religious liberty, but rather in the court’s recognition of the state’s limited jurisdiction. Few clerics claim that they have a religious justification for engaging in sex with their congregants, but that is not the proper constitutional inquiry. The doctrine of ecclesiastical immunity requires the court to determine

¹⁰⁵ Id. at 284 (citations omitted).

¹⁰⁶ Id. at 284.

¹⁰⁷ Id. at 284.

whether, and on what terms, it is competent to impose the standards of civil law on the clergy-congregant relationship.

Second, the court's expansive definition of the fiduciary's obligations make this cause of action virtually indistinguishable from malpractice, a claim that the court rejects because it "raises serious first amendment issues."¹⁰⁸ In addition to the duties of loyalty to and impartiality among beneficiaries, the court recognizes "a duty to exercise reasonable care and skill" in carrying out the fiduciary's responsibilities. A breach of the duty of loyalty, and perhaps also a breach of the duty of impartiality, might be proved without reference to a standard of care; but "reasonable care and skill" obviously depend on a standard of the "reasonably careful fiduciary."¹⁰⁹ The *Destefano* court does not explain how application of the reasonable fiduciary standard differs in any way from the constitutionally impermissible adjudication of the reasonable priest standard – and nor does any of the multitude of courts that has followed the *Destefano* court's analysis.¹¹⁰

Third, and most importantly, the court held that the relationship between priest and counselee imposed fiduciary obligations on the priest as a matter of law, and that sexual contact

¹⁰⁸ *Id.* at 285.

¹⁰⁹ For precisely this reason, a number of courts have rejected the distinction between clergy malpractice and breach of a cleric's fiduciary duties. See, e.g., *Dausch v. Rykse*, 52 F.3d 1425, 1438-39 (7th Cir. 1994), *Schmidt v. Bishop*, 779 F. Supp. 321, 326-27 (SDNY 1991), *Teadt v. Lutheran Church-Missouri Synod*, 237 Mich. App. 567, 577-81, 603 N.W.2d 816, 821-23 (Mich. Ct. App. 1999), *Langford v. Roman Catholic Diocese*, 271 A.D.2d 494, 495-705 N.Y.S.2d 661, 662 (N.Y. App. Div. 2000).

¹¹⁰ See, e.g., *Winkler v. Rocky Mountain Conf. of the United Methodist Church*, 923 P.2d 152, 157-58 (Colo. App. 1995), *Doe v. Evans*, 814 So. 2d 370, 373-75 (Fla. 2002), *F.G. v. MacDonell*, 150 N.J. 550, 563-67, 696 A.2d 697, 703-05 (1997).

between such a fiduciary and his beneficiary constituted a breach of the fiduciary's duties¹¹¹

These two determinations – the identification of a fiduciary relationship, and the designation of sexual contact between fiduciary and beneficiary as a breach – represent the fulcrum upon which turn *Destefano* and its substantial progeny. They also represent the point at which careful constitutional analysis is most needed, yet least often found in the decisions.

To establish the existence of a fiduciary relationship, the plaintiff is typically required to prove the following elements, as articulated in *Langford v. Roman Catholic Diocese of Brooklyn*:¹¹²

- 1) The vulnerability of one party to the other, which
- 2) results in the empowerment of the stronger party by the weaker which
- 3) empowerment has been solicited or accepted by the stronger party and
- 4) prevents the weaker party from effectively protecting itself.

For our purposes, the most constitutionally significant elements are the first two – the source of the plaintiff's vulnerability to the defendant cleric. Some courts have held that such vulnerability is the result of a “power imbalance between a clergy person and a parishioner.”¹¹³ Put more

¹¹¹ 763 P.2d at 284. In his concurring opinion, Justice Quinn makes this point more clearly: “No one can reasonably dispute the fact that the relation between a Catholic priest and a person of the same faith who is receiving marriage counseling from the priest is in a fiduciary relation founded on utmost trust and confidence.” *Id.* at 289 (Quinn, J., concurring).

¹¹² 177 Misc.2d 897, 900, 677 N.Y.S.2d 436, *aff'd*, 705 N.Y.S.2d 661, 271 A.D.2d 494 (2000) (citing Scallen, *Promises Broken vs .Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U.Ill.L.Rev. 897, 922). See also *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. App. 4th 257, 272; 130 Cal. Rptr. 2d 601, 611 (Cal. App. Dist. 1 2003).

¹¹³ *Enderle v Trautman*, 2001 WL 1820145 (D.N.D), at *5 (quoting *D.E.M. v. Allickson*, 555 N.W.2d 596, 604 (N.D. 1996)). See also *Doe v. Evans*, 814 So. 2d 370, 373-77 (Fla. 2002). This argument is advanced in *Villiers*, *supra* note **, at 46-48. See also *Zanita Fenton, Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 Mich. J. Gender & L. 45, 58-67 (2001).

starkly, the cleric's "fiduciary position is derived from his position as a pastor in his church."¹¹⁴

Leaders of non-religious voluntary associations are not generally deemed to stand in fiduciary relationships with adult members of the association. Why, then, should the law treat religious leaders differently?

Any answer that focuses on the peculiar nature of religious belief rests on dubious constitutional ground. In a careful consideration of this question, a California appellate court rejected a plaintiff's breach of fiduciary duty claim when the alleged duty was based on the religious relationship between priest and parishioner. "[T]he crucial questions [of] whether appellant was vulnerable to Reverend Namocatcat and unable to protect herself effectively would focus sharply on the nature and depth of her religious faith and its basis, if any, in Roman Catholic doctrine. These are, of course, profoundly religious questions, as to which courts may not constitutionally inquire."¹¹⁵

This constitutional limitation stems from the basic legal definition of a fiduciary relationship as an entrustment by one who is vulnerable to one who is not only stronger but who has also induced or accepted the vulnerable one's entrustment. In short, the fiduciary relationship requires intentional action by both the weaker and the stronger. To determine whether a religious relationship should give rise to fiduciary obligations, a court would need to examine the religious understandings of parishioner and priest. It is possible, of course, that the

¹¹⁴ Id. at *6.

¹¹⁵ Richelle L., 106 Cal. App. 4th at 282.

parties will hold consonant religious understandings of the relationship.¹¹⁶ It is equally possible, however, that the parties will assert divergent understandings.

How would a court resolve this difference? Several courts seem to rely solely on the subjective religious views of the plaintiff,¹¹⁷ but that approach effectively – and unconstitutionally – discriminates against religious defendants by imposing fiduciary obligations on them through the unilateral action of the alleged beneficiary. The alternative is no more constitutionally acceptable. If the plaintiff and defendant disagree about the religious meaning of the relationship, the court will need to decide between the rival understandings. Whether the decision is made by judge or jury, the constitutional offense is the same; a court may no more determine the ‘true’ theological meaning of a clergy-congregant relationship than it may determine the standard of a reasonable cleric, or who should be imam of a mosque, or which faction is more faithful in an intra-church dispute.

A fiduciary relationship between clergy and congregant must be grounded in something other than its religious character. The vast majority of cases of clergy sexual misconduct with adult victims, including *Destefano*, arise from counseling relationships.¹¹⁸ As we argued above, the Constitution does not bar adjudication of claims where the clergyman has held himself out as

¹¹⁶ See *F.G. v. MacDonell*, 150 N.J. 550, 560-61, 696 A.2d 697, 702-03 (1997) (priest admitted in deposition that sex with parishioner violated his fiduciary obligation to her).

¹¹⁷ *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (1999) (“Where a person's beliefs are alleged to give rise to a special legal relationship between him and his church, we may be required to consider with other relevant evidence the nature of that person's beliefs in order properly to determine whether the asserted relationship in fact exists”).

¹¹⁸ See *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. App. 4th 257, 274, 130 Cal. Rptr. 2d 601, 612 (Cal. App. 2003) (listing cases arising out of sexual relationship in religious counseling context).

willing and capable to provide secular counseling. The fiduciary character of the counseling relationship is established by secular considerations – the vulnerability of one who seeks therapy, induced and accepted by one who offers such services. The cleric-therapist’s initiation of a sexual relationship with his counselee will likewise be judged by secular standards – the extent to which such conduct violates the obligations of one who offers such therapy. It matters little whether the plaintiff’s claims are styled as therapist malpractice or a breach of fiduciary duties, because the standard of care will be measured by that of a reasonable practitioner of the secular therapy at issue.

More constitutionally problematic, however, are cases in which the cleric did not hold himself out as offering secular therapeutic counseling, but did provide religious counseling to a parishioner with whom he engaged in sexual misconduct. To assess such cases, it is important first to understand that the act of counseling does not create a legal relationship such that any sexual contact between the counselor and counselee constitutes actionable misconduct. Informal counseling between friends may lead to sexual intimacy, but the entrustment of confidences and its attendant vulnerabilities do not transform this intimacy into a breach of fiduciary duties.

Nor does the fact that two legally competent adults stand in a fiduciary relationship with one another mean that sexual contact between the two is necessarily a breach of the fiduciary’s duties. Sex between a stockbroker and client or a trustee and beneficiary creates no greater legal liability than that between any two adult strangers.¹¹⁹ Even the relationship between a physician

¹¹⁹ Of course, if the fiduciary conditioned performance of his duties on the beneficiary’s participation in a sexual relationship, the fiduciary likely would have breached his duty – but the sexual quality of the condition does not make it a breach; any condition not specified in the trust would constitute a breach.

and patient, with its – legally privileged – confidential conversations about treatment, is not one in which sexual contact represents a *per se* actionable breach of fiduciary duty.¹²⁰

In cases that have recognized fiduciary duty claims arising from sexual relationships between a doctor and patient, courts have typically focused on one of several special factors that would overcome the patient's capacity to give effective consent to intimate contact. Courts find a breach of fiduciary duties when a physician induces a patient to have sex by representing that the sex is part of the course of treatment,¹²¹ though such inducement may be better characterized as a form of fraud. As we discussed above, courts regularly hold that a physician has breached his fiduciary obligation if he offers therapeutic counseling, and the sexual relationship arises out of the transference-countertransference dynamic.¹²² Absent such factors, however, courts have been reluctant to hold physicians liable for engaging in sexual relationships with their patients, even if such conduct represents a serious breach of standards of professional ethics.

What, then, of a sexual relationship between a cleric and his congregant, when the affair does not arise out of a secular therapeutic counseling? If courts deciding such cases follow the decisions of cases involving sex between physicians and patients, they should be reticent about finding civil liability, even though no one defends the moral propriety of the sexual relationship. In particular, courts should avoid the temptation to impose heightened liability on religious

¹²⁰ See, e.g., *Atienza v. Taub*, 194 Cal. App. 3d 388; 239 Cal. Rptr. 454 (1987); *Darnaby v. Davis*, 2002 OK Civ. App. 103; 57 P.3d 100; *Odegard v. Finne*, 500 N.W.2d 140 (Minn. App. 1993). See generally, Scott M. Puglise Note: "Calling Dr. Love": The Physician-Patient Sexual Relationship as Grounds for Medical Malpractice – Society Pays While the Doctor and Patient Play, 14 J.L. & Health 321 (1999/2000).

¹²¹ Puglise, *supra* note **, at 336.

¹²²*Id.* at 335-36.

leaders because of the leaders' "sacred" position – a temptation into which a number of courts have fallen. Perhaps the starkest example of this can be found in *F.G. v. MacDonnell*,¹²³ in which the Supreme Court of New Jersey wrote:

Ordinarily, consenting adults must bear the consequences of their conduct, including sexual conduct. In the sanctuary of the church, however, troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them. Our decision does no more than extend to the defenseless the same protection that the dissent would extend to infants and incompetents.¹²⁴

In the *F.G.* court's reasoning, the religious quality of pastoral counseling is a crucial element of the parishioner's vulnerability. Trust in the pastoral relationship arises because parishioners "turn to their pastor in the belief that their religion is the most likely source to sustain them in their time of trouble."¹²⁵

The *F.G.* court's language raises serious constitutional concerns that the court has deployed civil law to enforce religious obligations – securing "the sanctuary of the church" for "troubled parishioners," who should be able find sustenance in their pastor's care.¹²⁶ Although the court refers at times to the duties of secular psychotherapists, the court does not rest the duties of a pastoral counselor on the cleric's practice of secular therapeutic techniques. Instead, the court explicitly grounds the duties of a pastoral counselor in the religious qualities of the

¹²³ 150 N.J. 550; 696 A.2d 697 (1997).

¹²⁴ *Id.* at 565. This passage was quoted, with approval, by the Florida Supreme Court in *Doe v. Evans*, another case involving sexual misconduct in a religious counseling relationship. 814 So.2d 370, 375 (2002).

¹²⁵ *Id.* at 564.

¹²⁶ See *Mansfield*, *supra* note ___, at 1170 (the civil duty to act or not act in a certain way may not be based on "a church's law, structure, or traditions").

relationship between clergy and congregant. Indeed, the court's rationale does not depend in any way on counseling as a course of treatment, and would easily encompass the act of sacramental confession. The *F.G.* decision thus reflects precisely the same constitutional defect as those that regard clergy to be fiduciaries of their congregants as a matter of law – both approaches impose special legal status on the religious character of a relationship.

In rejecting the approach taken in *F.G.*, we do not conclude that sex between a cleric and his congregant is only actionable if the cleric is engaged in the practice of secular therapeutic counseling. We do believe, however, that judicial assessment of sexual relationships between clergy and parishioners requires heightened sensitivity to the constitutional problems inherent in such adjudications. At a minimum, courts should ensure that religious defendants are not held to a heightened standard of care because of their religious character. This protection would likely require courts to inspect closely the plaintiff's case to determine if it contains sufficient evidence, not dependant upon religion-specific characteristics, of both a fiduciary relationship and breach of the attendant duty. Absent such evidence, the court should not permit the case to go to the jury.

To illustrate how such a case might proceed, we return to the analogous situation of sexual relationships between patients and physicians. In recent years, several courts have held that a physician may be held liable for engaging in sex with his patient, even if the physician did not offer therapeutic counseling or represent that sex was part of the medical treatment. For example, in *McCracken v. Wells-Kaufman*,¹²⁷ the District of Columbia Court of Appeals permitted a woman to proceed with a breach of fiduciary claim against her chiropractor, arising

¹²⁷ 717 A.2d 346 (D.C. 1998).

from the chiropractor's sexual contact with her during her course of treatment. The court recognized that the chiropractor's conduct did not fit within the normal categories for holding "a person engaged in the healing arts" liable for having sex with his patients: he was not engaged in the practice of psychotherapy; he did not hold himself out as a therapeutic counselor, and he did not "represent[] to the patient that sex is a part of the treatment."¹²⁸ Nevertheless, the court reversed the trial court's dismissal of the patient's claim, and held that such liability could also extend to contexts in which a health practitioner "become[s] engaged in giving counsel or advice to patients similar to that usually given by psychologists or psychologists."¹²⁹ The plaintiff alleged that the chiropractor invited discussion of personal matters during her treatments, provided advice and counseling to her on such matters, and knew that she was specially vulnerable because of an addiction to Valium.¹³⁰ Given those facts, the court held that the plaintiff's complaint survived the chiropractor's motion to dismiss.

A similarly structured inquiry could be applied in cases alleging sexual misconduct by clergy, where the cleric has not held himself out as practicing secular therapeutic counseling.¹³¹ As a minimum condition for imposing liability, the inquiry should establish that the cleric has

¹²⁸ Id. at 351.

¹²⁹ Id. at 353.

¹³⁰ Id. at 349. The court cites a Nevada case, *Hoopes v. Hammargren*, 102 Nev. 425, 725 P.2d 238 (Nev. 1986), on the question of the patient's particular vulnerability to exploitation. Id. at 351.

¹³¹ Where cleric held himself out as offering – or offered – secular therapeutic counseling, claims of sexual misconduct against him should be treated the same as claims against any secular counselor.

undertaken a regular course of counseling sessions with an adult congregant,¹³² in which the cleric offers the congregant particularized advice on personal – as opposed to entirely spiritual – matters. In addition, the congregant-plaintiff should demonstrate that the cleric knew of some special circumstance that made the congregant specially vulnerable to exploitation, such as a history of mental illness or substance abuse. Taken together, these requirements provide a safeguard against the temptation to hold clergy to a heightened standard of care because of their religious status, while simultaneously permitting courts to compensate plaintiffs who have been exploited in circumstances functionally identical to secular counseling.

B. Civil Claims Against Religious Organizations and Supervisors

In the preceding section, we discussed claims and charges against religious leaders accused of sexual misconduct. In this section, we examine plaintiffs' claims against religious organizations arising out of the sexual misconduct of their clergy.¹³³ For plaintiffs, claims of institutional liability are important because institutional actors are often the only available source of compensation for the wrongdoing. This is especially true when the wrongdoing happened long in the past, or when the wrongdoing involved criminal conduct for which the cleric is now incarcerated. Moreover, the victim frequently has a long and deep relationship with the religious community that was served by the wrongdoer, and is likely to experience the sexual abuse as a

¹³² The category of potential plaintiffs need not be restricted to members of the cleric's congregation – or even faith tradition – so long as plaintiff can show she or he developed a counseling relationship with the cleric. As noted above, this category of claims only involves mentally competent adults who engaged in non-coercive sexual relationships with the cleric.

¹³³ For purposes of simplicity, we typically refer in this section only to the liability of the organization, although plaintiffs frequently make claims against individual agents of the organizations as well.

betrayal of trust that the victim placed in the community and its faith.

In this section, we divide plaintiffs' civil law claims against religious institutions into three categories. The first consists of claims that arise out of the religious organization's direct interactions with the plaintiff, including allegations that the organization breached obligations toward the plaintiff that it undertook in responding to the plaintiff's injury. The widely cited decision of the Supreme Court of Colorado in *Moses v. Diocese of Denver*¹³⁴ is a good example of an alleged breach of the fiduciary's duty of loyalty, raised by a victim of sexual misconduct against a church official who had supervisory authority over the wrongdoer.

The second encompasses claims arising out of the organization's actions taken with respect to the wrongdoer – including training, hiring, and supervising – that are alleged to have caused harm to the plaintiff. The recent decision of a Massachusetts trial court in *Hogan v. Archbishop of Boston*,¹³⁵ which led to the \$85 million settlement of claims brought by several hundred plaintiffs, provides a typical list of alleged breaches of duties of care. The plaintiffs claimed that the Archbishop and his agents acted negligently with respect to the ordination, assignment, selection, supervision, transfer, and retention of its priests.¹³⁶

The third category consists of claims that the religious organization should be held vicariously liable for the sexual misconduct of its employee. These claims do not involve allegations of wrongful conduct on the part of the institution, but rather impute to the

¹³⁴ 863 P.2d 310 (Colo. 1993).

¹³⁵ Suffolk Co. Superior Ct, online at www.socialaw.com/superior/supFeb03xx.htm.

¹³⁶ The court distinguished plaintiffs' negligent retention, selection, and transfer claims from negligent failure to laicize – i.e., to strip priests' ordination. *Id.*

wrongdoer's employer the responsibility for bearing the costs of its employee's misdeeds.

1. Institutional Fiduciary Duties to Victims of Sexual Misconduct

In Part III.A., above, dealing with claims against sexual wrongdoers, we noted the persistent trend among courts to reject claims of clergy malpractice while remaining receptive to claims that clergy had breached fiduciary duties to their parishioner-counselees. It was only with more caution than courts have exercised that we approved of this move, which rests on the constitutional presupposition that the state may not define duties of pastoral care but may specify duties of pastoral-counselor loyalty

When the locus of liability shifts from clergy wrongdoers to institutional actors who stand behind them, the constitutional norms may play out in more subtle ways but the underlying dynamics remain the same. Here, too, legally imposed duties must be crafted in constitutionally sensitive ways. Tort law rules and processes should not permit the imposition of duties that are triggered by religious character alone, or would effectively require religious entities to restructure themselves to satisfy a state-imposed vision of the "good" or well-ordered religion.

In a number of recent suits, plaintiffs have diversified their claims against organizations in much the same ways that they and their lawyers have learned to do against individual wrongdoers. It has become routine for such lawsuits to include claims that the defendant institutions and/or supervisors have breached fiduciary duties, as well as duties of care, to plaintiffs who assert that they have been victims of sexual abuse. In the context of institutional claims, however, fiduciary responsibilities have a very different character than in the context of claims against clergy alleged to be sexual wrongdoers. In the latter context, the assertion always involves a close personal relationship between the clergyman and the parishioner; the fiduciary

breach story is one of a counselor taking sexual advantage of his counselee. In contrast, the institutional fiduciary claims rarely involve any close, personal connection between organizational leaders and victims of sexual abuse. Instead, the claim of fiduciary breach in such cases typically arises out of the organization's failure to investigate allegations of wrong,¹³⁷ or its failure to warn potential victims,¹³⁸ or its failure to take earlier remedial action against known wrongdoers.¹³⁹

The law of fiduciary duties requires a demonstration that a relation of trust and confidence exists between the parties – that the claimed beneficiary of the duty has reposed special confidence in the claimed holder of the duty, and that the asserted holder of the duty has accepted that trust.¹⁴⁰ In such a relationship, the trusted party is under a legal duty to act for, and give advice for the benefit of, the trusting party on matters within the scope of their relationship.¹⁴¹ A number of courts have dismissed on the pleadings such claims against religious institutions, on the theory that the defendant religious organization and its representatives have not undertaken any special duties with respect to all adherents of the faith.¹⁴²

¹³⁷ See, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 426-30 (2d Cir. 1999).

¹³⁸ *Bryan R. v. Watchtower Bible & Tract Soc'y*, 738 A.2d 839 (Me. 1999).

¹³⁹ *Doe v. Evans*, 814 So.2d 370, 372 (Fla. 2002).

¹⁴⁰ See *supra* notes **-* and accompanying text (defining elements of fiduciary relation).

¹⁴¹ Restatement (Second) of Torts § 874 comment a.

¹⁴² *Bryan R. v. Watchtower Bible & Tract Soc'y*, 738 A.2d 839, 844-47 (Me. 1999); *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. 1997); *Podolinski v. Episcopal Diocese of Pittsburgh*, 23 Pa. D & C 4th 385, 395-98 (Pa. Com. Pl. 1995).

These courts have recognized that religious institutions have their own set of interests, some religious and some material, which may conflict with the interests of adherents of the faith. Accordingly, adherents do not have any legitimate expectations that organizations will respond to assertions of sexual misconduct by clergy with actions taken for the sole benefit of the accuser. Moreover, religious organizations – especially those that are large and bureaucratic – do not and cannot be reasonably expected to have relationships of personal trust and confidence with each and every adherent to the faith.

Nevertheless, perhaps out of understandable impulses that wrongs should be remedied and that religious organizations, claiming to do God’s work, should be held to standards higher than that of the marketplace, some prominent courts have begun to expand the fiduciary obligations of religious organizations and their spokespersons in cases involving sexual abuse. The first important decision in this line of development is *Moses v. Diocese of Colorado*,¹⁴³ decided by the Colorado Supreme Court in 1993. Ms. Moses (now known as Mary Moses Tenantry, and so referenced in the opinion), who had been sexually abused by her father and had a long history of mental illness, became sexually involved with a Episcopal priest, Father Robinson, at her church. Ms. Tenantry had sought the priest out for counseling on family matters, although the opinion hints that her infatuation with him began prior to the counseling. When her husband learned of the affair, he consulted with the Diocesan Bishop, who asserted his desire to supervise “whatever needed to happen.”¹⁴⁴ In the presence of Ms. Tenantry’s husband, the Bishop confronted Father Robinson, the offending clergyman, who by this time had become

¹⁴³ 863 P.2d 310 (Colo. 1993).

¹⁴⁴ *Id.* at 317.

pastor of a different church, and urged him to get counseling and to advise the Bishop immediately if there were any similar episodes in his new parish.

The Bishop then met with Ms. Tenantry, and advised her to stay away from Father Robinson. He further advised her to stop talking about her affair to anyone except for her husband and a “priest or counselor.” In the words of the opinion, the Bishop “took no further action to assist Tenantry after this meeting.”¹⁴⁵

Three years later, Tenantry had a chance encounter with Father Robinson. She reported this to her husband, and this somehow spiraled into dissolution of her marriage, collapse of other family relations, failure of her business, and profound collapse of her mental health. At trial, mental health experts testified that the Bishop’s willingness to support Father Robinson in his assignment at his new parish “led to the unraveling of Tenantry’s personality structure.”¹⁴⁶ More particularly, these experts testified that her personality structure depended upon her relationship with the church, in which she had lost confidence as a result of her experience with Father Robinson and the Bishop. The Bishop’s actions, according to this testimony, aggravated her breakdown in trust because the Bishop “1) allowed her to believe that she was primarily at fault; 2) did not ask to hear her side of the affair; 3) did not ask her how she felt about the relationship or how she planned to deal with it; and 4) requested that she maintain secrecy about the relationship.”¹⁴⁷

The Colorado Supreme Court affirmed a judgment for Tenantry against the Bishop and

¹⁴⁵ Id. at 318.

¹⁴⁶ Id.

¹⁴⁷ Id. at 318, n. 9.

the Diocese. Asserting the quite familiar distinction between clergy malpractice and fiduciary duties,¹⁴⁸ the Court ruled that the jury had been properly instructed on the elements of fiduciary duty, and that there had been sufficient evidence to support the verdict. As the Court characterized the claim, “this case involves a party who used his superior position as a counselor, a bishop, and a final arbiter of problems with the clergy to the detriment of a vulnerable, dependent party.”¹⁴⁹

The *Moses* opinion is full of danger signs for religious organizations, and it has spawned other decisions against them on considerably weaker facts. It is not hard to see the ways in which Ms. Tenantry’s troubled past would lead the courts, and the jury, to be sympathetic with her plight. But it is equally easy to see, if one is willing to look, that the Bishop did not hold himself out as her counselor, nor did he represent that he was acting in her interest rather than the institutional interests of the church in clergy management and crisis control. The expert’s testimony that the Bishop did not listen to Ms. Tenantry’s side of the story, or help her explore her feelings or her planned course of action, is quite inconsistent with a claim that he was acting as her spiritual counselor rather than the caretaker of the church’s interests. When juries are permitted, under vague and general instructions, to permit the institutional position of Bishop or pastoral leader to become dispositive factors in the imposition of fiduciary duties, they are effectively imposing upon religious organizations a state-backed vision of how pastoral relations and religious organizations should be conducted. As understandable as those normative

¹⁴⁸ The Colorado had pioneered the distinction in *DeStefano*, discussed and criticized in Part III.A. above.

¹⁴⁹ *Id.* at 322.

expectations may be, application of them to religious organizations in cases like *Moses* is in serious tension with the First Amendment considerations associated with the doctrines of ecclesiastical immunity.¹⁵⁰

The constitutional defects lurking in the *Moses* decision became manifest two years later in *Winkler v. Rocky Mountain Conference*,¹⁵¹ decided by a Colorado appellate court. Winkler, a church volunteer, alleged that she and other women had been groped by their pastor; she sued the pastor, the congregation, and the United Methodist Conference to which the congregation belonged, alleging, among other things, breach of fiduciary duty. The local congregation settled with the plaintiff, but the plaintiff received a substantial jury award in her fiduciary duty claim against the conference. In contrast to *Moses*, Winkler's claims do not arise out of the direct counseling relationship between conference officials and herself. Instead, the alleged fiduciary relationship is based entirely on actions taken by the conference in investigating her charges:

Winkler asserts that a fiduciary relationship was created by the Conference assuming control of the investigation of her complaints and those of others. Winkler argues that such a fiduciary relationship was created by: (1) the Conference's actions at the April 24, 1992, meeting at which the Conference seemed very concerned about the women and wanted them to stay together and be supportive of each other; (2) the Conference providing a therapist to help the women; and (3) the Conference preparing and sending a letter to the Grace Church congregation stating that: "We are equally concerned for the healing of any persons who have been hurt. They will continue to receive appropriate help for their healing and restoration."¹⁵²

¹⁵⁰ If Father Robinson exploited another counselee at his new parish, and the Bishop had failed to warn officers at that parish of Father Robinson's prior problems, potential liability to the next victims would rest on theories of negligence we explore in Part III. ___ below, rather than a theory of fiduciary duty.

¹⁵¹ 923 P.2d 152 (Colo. Ct. App. 1995).

¹⁵² *Id.* at 158.

Winkler then alleged that the conference breached its fiduciary duties by not providing the victims with adequate support, which included the conference's failure to inform the congregation "that it had found the women's claim credible." Although the conference's act of providing counseling may look like a traditional fiduciary's undertaking,¹⁵³ Winkler did not allege any breach arising out of the quality of that counseling. The breach seems to involve only the quality of the conference's administrative response to the cleric's wrongdoing.¹⁵⁴ Nonetheless, the court sustained the jury's finding that the conference owed, and had breached, fiduciary duties to Ms. Winkler.

Four years later, judicial willingness to permit claims of fiduciary duty against organizations expanded yet further in a highly influential decision of the U.S. Court of Appeals for the Second Circuit in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*¹⁵⁵ *Martinelli* involved allegations that the Diocese had failed, in the middle 1960's, to investigate complaints about Father Lawrence Brett, who had been a parish priest in Stamford, Connecticut and then spiritual director at a Catholic college within the Diocese. Father Brett had initiated a sexual relationship with Mr. Martinelli at a time when Brett "acted as a mentor and spiritual advisor to a small group of boys, including Martinelli, who were interested in liturgical reforms in the Catholic Church."¹⁵⁶ Martinelli alleged that he recovered his memory of this experience in the

¹⁵³ The conference did not directly provide the women with counseling; instead, it financed counseling of the women provided by professionals. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 196 F.3d 409 (2nd Cir. 1999).

¹⁵⁶ *Id.* at 414.

early 1990's, and complained in his lawsuit that the Diocese had not pursued the complaints about Father Brett that it received from others in the middle 1960's. Had the Diocese done so, Martinelli claimed, it would have discovered that he had been abused by Father Brett, and it would have helped Martinelli to seek the sort of assistance that might have prevented the emotional harm that befell him as his life proceeded.¹⁵⁷

The fiduciary claim in *Martinelli* played a central role in the disposition of the case, because of the statute of limitations. Had Martinelli's claim sounded only in negligence, his claim would have been time-barred. If, however, the claim of fiduciary obligation and breach was legally sufficient, tolling doctrines of fraudulent concealment (applicable to those with fiduciary obligations) would come into play and open up the possibility of recovery on the merits.

Under the pressure of this problem of the period of limitation, the Second Circuit ruled that the Diocese could be found to have fiduciary obligations to Martinelli. The Diocese argued that it could not be held to have a special relationship of trust and confidence with each and every one of the 300,000 Roman Catholics in the Bridgeport Diocese. The Court rejected, however, this way of viewing the case. The complaints that had come to the Diocese in 1966 included one from a young man who had been a member of the small group of boys with whom Father Brett had cultivated special and close relationships. Accordingly, the Court reasoned, the Diocese had a duty to the other students in that small group to investigate further, to locate other victims if there were any, and to help such victims cope with the emotional injury inflicted by their experience with Father Brett.¹⁵⁸

¹⁵⁷ Id. at 426.

¹⁵⁸ Id at 430.

Like *Moses*, the opinion in *Martinelli* proceeds from understandable impulses. Martinelli had suffered emotionally from Father Brett’s encounters with him, and the Diocese had done nothing to search out other, unknown victims of Father Brett’s sexual misconduct. But here, as in *Moses*, the imposition of fiduciary duties upon the Diocese to a young man whose identity was unknown involves assertions of a relationship of personal trust and confidence that the Diocese had not undertaken. That parishioners hope and expect that religious officials will respond to allegations of wrongdoing in a proactive, victim-oriented way cannot in and of itself create a relationship in which the religious organization is legally obliged to do so. To hold otherwise is to make the combination of organizational expectations held by parishioners, judges, and juries the measure of organizational liability. And that measure, imposed by the expectations of third parties rather than by explicit undertakings of the faith community, will inevitably result in pressure to internalize state-imposed changes in organizational structure. Whatever it is labeled, this kind of liability represents a normative judgment about organizational (mal)practice – that is, a judgment about how the religious polity responds in crisis to its own representatives, the clergy, and to its adherents.¹⁵⁹

For church lawyers looking for ways to confine *Martinelli*, the fact that Mr. Martinelli was a member of a small group of followers of Father Brett, and that the Diocese had learned that Father Brett had abused another boy in that group, represents the case’s dominant and potentially limiting feature. The recent decision of the Supreme Court of Florida in *Doe v. Evans*¹⁶⁰ thus

¹⁵⁹ Mark Chopko characterizes this sort of liability as “situational.” See Chopko, *supra* note __, at 1106-07.

¹⁶⁰ 814 So. 2d 370 (Fla. 2002).

must have sent a chill up the spines of such lawyers, because *Doe* significantly expands the trend toward recognizing organizational fiduciary duties in cases in which there is no personal, face-to-face relationship between the organization and the claimed beneficiary.

Ms. Doe, an adult at all relevant times, alleged that she belonged to the Church of the Holy Redeemer, an Episcopal Church in the Diocese of South Florida; that Pastor Evans had offered her pastoral marital counseling when he learned that she was having marital difficulties; that he had commenced a personal and romantic relationship with her,¹⁶¹ which had caused her harm; and that the Diocese and its officers knew that Evans had engaged in sexual misconduct during counseling at this and other churches within the Diocese. Doe also alleged that the Diocese had the right to “exercise control” over a sexually exploitive pastoral counselor, and had failed to do so. She asserted that the Diocese’s actions constituted negligent hiring, negligent supervision, and a breach of fiduciary duty. The lower court dismissed these claims on First Amendment grounds, ruling that all of them involved assertions of “clergy malpractice” that were improper for courts to consider.

The Florida Supreme Court reversed and reinstated all of Ms. Doe’s claims. The Court had analyzed comparable negligence problems in a very recent companion case, *Malicki v. Doe*,¹⁶² and said virtually nothing new in *Evans* about issues of negligent supervision, other than an assertion that such claims involved “neutral principles” of law and therefore were not subject

¹⁶¹ *Id.* at 371-73. The complaint does not allege a sexual relationship, although the parties briefed the case, and the Court decides it, on the assumption that the relationship was sexual. One of the dissenting judges rested his objections to the opinion on the ground that the Court had impermissibly gone outside the pleadings in making this assumption. *Id.* at 379-381 (Wells, C.J., dissenting).

¹⁶² 816 So.2d 347 (Fla. 2002).

to the First Amendment bar. With respect to the fiduciary duty claim, the Court was brief and blunt. Citing the Second Circuit's opinion in *Martinelli*,¹⁶³ the opinion announced:

[W]hen a church, through its clergy, holds itself out as qualified to engage in marital counseling and a counseling relationship arises, *that relationship between the church and the counselee is one that may be characterized as fiduciary in nature*. . . . [A]s to the relationship between Doe and . . . the Church Defendants, it is a question for the jury to determine whether a fiduciary relationship arose; the nature of that relationship; and whether as a result of the Church defendants' conduct, there was a breach of the Church Defendants' duty as fiduciaries to Doe.¹⁶⁴

The opinion at this point drew no distinction between the Church of the Holy Redeemer, which employed Pastor Evans, and the Episcopal Diocese of South Florida, which stood somewhere in the background of that employment relation, but was not a party to it.

Doe v. Evans thus completes the cycle of expansion of institutional fiduciary duties. Unlike claims against the sexual wrongdoer, in which fiduciary duties arise out of the personal undertaking as counselor, such duties arise in *Doe v. Evans* out of wholly impersonal relations between the church and its adherents. The duty springs from the general church's holding out its pastors as willing to counsel its adherents, coupled with general knowledge of a pastor's tendencies to exploit such relationships in the past. Under legally apt circumstances of control, discussed below, we can understand and might well approve the imposition of duties of supervision on Pastor Evans, although they fall more easily on his employer, the Church of the Holy Redeemer, than on the far more remote Episcopal Diocese of South Florida. Failure to supervise, by one with knowledge of danger and in a position to supervise, might well give rise

¹⁶³ The Court also cited the Colorado Supreme Court's opinion in *DeStefano*. *Id.* at 374.

¹⁶⁴ *Id.* at 375.

to liability in negligence.

The holding in *Doe v. Evans*, however, goes considerably further. It is unmindful of degrees of care and supervision that the church and the Diocese might have imposed on Pastor Evans, and it is particularly heedless of questions of diocesan control, or lack thereof, over the hiring and work of pastors. The decision effectively instructs such a religious organization that it acts at its peril if it fails to remove from any pastoral role all clergy that it has reason to know have tendencies like those allegedly possessed by Evans.

Religious polities and personnel policies of the sort dictated by *Doe v. Evans* may well be prudent and humane. To those untutored in the complex structure of religious organizations, and the pastoral quality of their personnel arrangements, the Florida Supreme Court's expectations of how such organizations should behave will seem entirely reasonable. And juries, which will be asked to apply this new, sweeping conception of fiduciary duty, are likely to share those expectations, especially in a world flooded with stories about pedophile priests and lustful clerics of every religious persuasion.

Nevertheless, we believe that the trend represented by the decisions from *Moses* to *Evans* creates three, distinct problems. First, the triggering of fiduciary duties by meetings between religious leaders and victims may create disincentives to ameliorative contacts within the religious community.¹⁶⁵ Whatever mixture of institutional interests and victim-supportive concerns may produce such interactions, they have the potential to accomplish some good. If institutions, in doing more than they must create a risk of liability for doing less than they might,

¹⁶⁵ See Patrick Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. Rev. 949 (2003)

such efforts inevitably will decrease in frequency.

Second, this line of decisions finds no counterpart among secular institutions, and therefore raises a question of discrimination against religious organizations in application of the law. Perhaps courts would apply comparable fiduciary standards to secular entities in an appropriate case, but this saving possibility has not yet arisen and there is reason to doubt that courts would do so, especially in circumstances where the relationship is as remote as that between the Diocese and the plaintiff in *Doe v. Evans*. Courts could, of course, take steps toward solving this problem by making clear that such theories of fiduciary duty apply equally to both religious and secular organizations. Even if the doctrine were so clarified, jury instructions should be carefully framed so as to warn against relying on an institution's religious character as itself a source of legal duty.

Third, as we emphasize throughout this paper, the state is forbidden from using the civil law to impose a normative vision of the structure of religious organizations. Such organizations face complex tasks, material and spiritual. They have responsibilities to their adherents, but they also maintain relationships with their financial supporters, with other organizations in their community, and, most importantly, with the religious tradition of which they represent the living embodiment. Like many secular non-profit organizations, they operate through a variety of agents, both employees and volunteers. Without question, they should be aware of the risks of harm to third parties which their activities may create, and they should take reasonable precautions – within the boundaries of their own self-determined structures – to avoid the harms such risks entail. Encumbering them, however, with special duties of loyalty to their adherents, who may number in the many millions and be spread across the globe, inevitably involves either

a rearrangement in their structure, policy, or practice of relations with clergy, or – if they are unwilling to so rearrange under the pressures of tort law – a system of fines upon them for continuing to rely on structures of authority inadequate to control clergy who misbehave. Because such duties of loyalty effectively dictate the mechanisms of control over clergy, and organizational response to victims of clergy misbehavior, imposing them tends to unconstitutionally establish a legally preferred structure of denominational life.

2. Institutional Duties of Care in Employment of Clergy

Most of the cases brought against religious organizations allege that such institutions are obliged to act with reasonable care in their employment practices, especially when their employees will have significant interaction with children or other vulnerable people. Plaintiffs' claims of institutional negligence can be divided into two general categories. The first consists of charges that the defendant negligently conferred religious status on the wrongdoer; the second includes claims that the defendant negligently employed the wrongdoer. We discuss each in turn.

a. Negligent Ordination

Claims in this category are the most constitutionally problematic, and are – perhaps for that reason – the least commonly raised by plaintiffs. Four different kinds of alleged negligence fall within this heading: the religious entity should have done a better job of screening candidates for the ministry to eliminate those with a propensity for sexual misconduct;¹⁶⁶ the entity should

¹⁶⁶ Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d 139, 143 (D. Conn. 2003); Roman Catholic Bishop of San Diego v. Superior Court, 42 Cal. App. 4th 1556, 1562-64 (1996); Beach v. Jean, 746 A.2d 228, 234-35 (Conn. Super. 1999); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159, 162-63, 654 N.Y.S.2d 791, 794 (1997); Pritzlaff v. Archdiocese of Milwaukee, 194 Wis.2d 302, 309-10, 533 N.W.2d 780, 783 (1995)

have trained candidates for the ministry in how to avoid or prevent sexual misconduct;¹⁶⁷ the entity should not have ordained (or licensed or certified) a particular candidate for ministry;¹⁶⁸ or the entity should have revoked the wrongdoer's religious status.¹⁶⁹

As far as we can tell, no court has permitted a plaintiff to proceed on a claim that an institution negligently prepared or ordained a candidate for ministry.¹⁷⁰ The constitutional defects with such an inquiry are all too obvious. Qualification for ordained ministry, whether as a general question or as applied to a particular candidate, is a quintessentially religious question because – if for no other reason – ordination is an exclusively religious category.¹⁷¹ On two occasions, the U.S. Supreme Court has held that courts cannot exercise jurisdiction over the

¹⁶⁷ *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F. Supp. 2d 139, 144 (D. Conn. 2003); *Wilson v. Diocese of New York of the Episcopal Church*, 1998 U.S. Dist. LEXIS 2051, *13-*14 (SDNY).

¹⁶⁸ *Rashedi v. General Board of Church of the Nazarene*, 203 Ariz. 320, 322-23, 54 P.3d 349, 351-52 (Ariz. Ct. App. 2002); *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 162-63, 654 N.Y.S.2d 791, 794 (1997).

¹⁶⁹ *Hogan v. Roman Catholic Archbishop of Boston (negligent failure to laicize)* (online at <http://www.sociallaw.com/superior/supFeb03xx.htm>).

¹⁷⁰ The closest case may be *Harkins v. Gauthe*, 707 So.2d 1308 (La.App. 1998) (priest employed by the diocese sexually molested a boy at a motocross event; court held that “this priestly status, which is conferred by the church” can be the basis of the diocese’s duty to a Catholic child – even though the child did not plead that he was a member of a congregation within that diocese. *Id.* at 1313-1314).

¹⁷¹ “Whether an individual is qualified to be a clergy member of a particular faith is a matter to be determined by the procedures and dictates of that particular faith.” *Rashedi v. General Board*, 54 P.3d 349, 352 (Ariz. App. 2002) (citations omitted). See Chopko, *supra* note ___, at ___.

eligibility of candidates for ecclesiastical office.¹⁷² The ministerial exception to employment laws has a similar function; it strictly limits the ability of courts to intervene in disputes about the qualification or employment status of clergy.¹⁷³

Claims about the screening or training of candidates for ministry may seem, at first glance, to be less objectionable than those focused on the decision to ordain or license a candidate. After all, seminaries and theological schools often have to comply with standards for accreditation, which tend to have far more robust requirements than those proposed by plaintiffs.¹⁷⁴ Accreditation, however, is voluntary. Organizations may choose to require their leaders to obtain certain credentials, but the government does not – and cannot – mandate any qualifications for ordained ministry. Indeed, hostility to government licensing of ministers is an important part of the historical legacy of the Constitution’s Religion Clauses.¹⁷⁵

Finally, a duty of “reasonably careful ordination” would place a greater burden on religious organizations than is imposed on non-religious bodies, and therefore violate the constitutional norm against disfavoring religious entities. Neither law schools nor state bar associations can be held liable for negligent preparation for or admission to the bar. Because

¹⁷² *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

¹⁷³ See *supra* notes **-* and accompanying text.

¹⁷⁴ Accreditation standards of the Association of Theological Schools in the United States and Canada (online at: ats.edu/accredit/stantoc.htm).

¹⁷⁵ See John T. Noonan, *The Lustre of Our Country: The American Experience of Religious Freedom* 67 (1998) (on James Madison’s opposition to the Crown’s licensing of ministers in Virginia); Edward M. Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. Det. Mercy L. Rev. 491, 503-05 (2001) (same).

other theories of relief can address the harms about which the state has a legitimate concern – protection of the vulnerable from foreseeable harm – courts should continue to reject claims of negligent preparation for ministry.

b. Negligent Employment

Plaintiffs’ most common claims of institutional negligence focus on the defendant’s employment relationship with the wrongdoer. The claims allege that the defendant failed to exercise due care in one or more facet of that relationship, whether in hiring, supervising, or failing to discharge the wrongdoer. In contrast to claims of negligent ordination, those alleging negligent employment practices have clear and well established secular parallels. Section 307 of the Restatement (Second) of Torts provides: “It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others.”¹⁷⁶ Section 317 of the Restatement (Second) of Torts extends that liability to acts that fall outside the scope of the agent’s employment:

¹⁷⁶ Restatement (Second) of Torts § 307; Restatement (Second) of Agency § 213 (“A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others”). In the context of clergy sex abuse, plaintiffs’ claims of negligent hiring involve defects in the decision to place a candidate in a specific position, or defects in the process of selection – that is, the employer should have done more thorough investigation or screening of candidates. See, e.g., *Nutt v. Norwich Roman Catholic Diocese*, 56 F. Supp. 2d 195, 200-01 (D. Conn. 1999); *Roman Catholic Bishop of San Diego v. Superior Court*, 42 Cal. App. 4th 1556, 1562-67 (1996); *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 842-43 (1992); *Moses v. Diocese of Colorado*, 863 P.2d 310, 323-29 (Co. 1993) ; *Petho v. Fuleki*, 10 Conn. L. Rptr. 254, 1993 WL 446795 (Conn. Super. 1993); *Malicki v. Doe*, 814 So.2d 347, 361-63 (Fla. 2002); *J.M. v. Minnesota District Council of the Assemblies of God*, 658 N.W.2d 589, 593-94 (Min. App. 2003); *Jones v. Trane*, 153 Misc. 2d 822, 829-30, 591 N.Y.S.2d 927, 931-32 (1992); *Podolinski v. Episcopal Diocese of Pittsburgh*, 23 Pa. D.&C. 4th 385, 401-04 (1995).

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.¹⁷⁷

The Comment to Section 317 addresses liability for negligent retention:

There may be circumstances in which the only effective control which the master can exercise over his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.¹⁷⁸

Despite widespread recognition of the tort of negligent employment in cases against secular employers, courts have disagreed sharply on the constitutionality of applying the tort to religious institutions' employment of clerics and other leaders.¹⁷⁹ In some jurisdictions, courts have held that the First Amendment confers on religious institutions complete immunity from

¹⁷⁷ Restatement (Second) of Torts § 317. Section 317 is important because so few courts have found sexual misconduct – especially involving children – to be within the scope of the cleric's employment. See also *Konkle v. Henson*, 672 N.E.2d 450, 454-55 (Ind. App. 1996); *Nardella v. Dattilo*, 36 Pa. D.&C. 4th 364, 379-80 (1997).

¹⁷⁸ Restatement (Second) of Torts § 317 Comment c.

¹⁷⁹ Other scholarly attempts to discuss these questions include Mansfield, *supra* note ___, at ___; Carmella, *supra* note ___, at ___; Chopko, *supra* note ___, at ___; Christopher Farrell, Note, Ecclesiastical Abstention and the Crisis in the Catholic Church, 19 J. L. & Pol. 109 (2003).

claims of negligent employment,¹⁸⁰ while courts in other jurisdictions have held that the First Amendment provides no such immunity¹⁸¹ – indeed, that the Establishment Clause may actually prohibit a grant of immunity in this context.¹⁸² As we argue below, these two categorical approaches are inadequate models of legal analysis, both in terms of the constitutional values and of the public policies at stake in adjudications of negligent employment claims against religious organizations. After examining and rejecting the two categorical models, we offer a more nuanced way to accommodate the relevant constitutional and policy concerns.

i. Categorical Approaches

When faced with claims that a religious institution has failed to exercise due care in the employment of a religious leader, courts tend to proceed on an all-or-nothing basis. These courts hold that either the First Amendment imposes no limitation on applying traditional tort standards, or the First Amendment stands as a complete bar to the application of those standards.

a. No Immunity

The first approach holds that religious employers deserve no different treatment than secular employers for their tortious employment practices. On this view, the First Amendment offers religious institutions no shield against claims of negligent hiring, supervision, and

¹⁸⁰ See, e.g., *Bryan R. v. Watchtower Bible & Tract Soc’y*, 738 A.2d 839 (Me. 1999); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441 (Me. 1997); *L.L.N. v. Clauder*, 563 N.W.2d 434 (Wisc. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wisc. 1995).

¹⁸¹ *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super Ct. 1998); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Doe v. Evans*, 814 So.2d 370 (Fla. 2002).

¹⁸² *Smith v. O’Connell*, 986 F. Supp. 73, 80 (D.R.I. 1997) (citing *Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring)).

retention, especially when those claims are raised in the context of clergy sexual misconduct.

Many courts that have adopted this “no immunity” approach point to language in an opinion by Justice William Rehnquist, in which he denied a stay in a case involving a religious nursing home:

There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But the Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. . . . [Some] cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations 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.¹⁸³

Courts that adopt this approach draw a sharp distinction between internal and external disputes, and restrict the doctrine of ecclesiastical immunity to disputes that are internal. Tort claims fall squarely outside that limit. A dispute involving “those who allege that they were seriously injured by the negligence of the church officials . . . hardly can be characterized as a dispute involving an internal church matter.”¹⁸⁴

Moreover, courts that reject ecclesiastical immunity typically find that the tort of negligent employment is a “neutral principle of law,” applicable to religious institutions even if

¹⁸³ *General Council on Fin. & Admin. v. Superior Court of California*, 439 U.S. 1355, 1372-3 (1978). Quoted in *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F. Supp.2d 139, 144 (D. Conn. 2003); *Malicki v. Doe*, 814 So.2d 347, 356-57 (Fla. 2002); *Konkle v. Henson*, 672 N.E.2d 450, 455 (Ind. App. 1996); *G.B. v. the Archdiocese of Portland in Oregon*, 2002 U.S. Dist. LEXIS 7033 (D. Or.); *JC2 v. Maurice Grammond*, 232 F. Supp. 2d 1166 (D. Or. 2001).

¹⁸⁴ *Smith v. O’Connell*, 986 F. Supp. 73 (D. R.I. 1997). This distinction between internal and external matters is also found in *Malicki v. Doe*, 814 So.2d 347, 355-65 (Fla. 2002); *Konkle v. Henson*, 672 N.E.2d 450, 455-56 (Ind. Ct. App. 1996); *Podolinski v. Episcopal Diocese of Pittsburgh*, 23 Pa. D & C 4th 385, 410-11 (Pa. Com. Pl. 1995).

the dispute involves questions of religious documents or practices.¹⁸⁵ These courts’ use of the “neutral principles” approach – approved by the Supreme Court in cases involving disputes over religious property¹⁸⁶ – is reducible to a basic proposition: “The court is simply applying secular standards to secular conduct, which is permissible under the First Amendment.”¹⁸⁷ “Secular standards” refers to the principles of tort law which define an employer’s liability for negligently hiring, supervising, or retaining an employee.¹⁸⁸ “Secular conduct” reflects these courts’ tendency to analyze defendants’ constitutional arguments under the free exercise clause. Because defendants rarely claim that the wrongdoer’s misconduct was religiously motivated, courts find that the religious institution’s response to that misconduct is not religious either, and so their inquiry does not implicate defendants’ rights under the First Amendment.¹⁸⁹

¹⁸⁵ *Rashedi v. General Board of the Church of the Nazarene*, 203 Ariz. 320, 325-26, 54 P.2d 349, 354-55; *Moses v. Diocese of Colorado*, 863 P.2d 310, 319-21 (Colo. 1993); *Jones v. Trane*, 153 Misc. 2d 822, 828-29, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992); *Bivin v. Wright*, 275 Ill. App. 3d 899, 902-04, 656 N.E.2d 1121, 1124-25 (Ill. App. Ct. 1995); *Konkle v. Henson*, 672 N.E.2d 450, 454-56 (Ind. Ct. App. 1996); *Smith v. Privette*, 128 N.C. App. 490, 492-95, 495 S.E.2d 395, 396-98 (N.C. Ct. App. 1998); *Enderle v. Trautman*, 2001 WL 1820145, *8-*10 (D.N.D.); *Podolinski v. Episcopal Diocese of Pittsburgh*, 23 Pa. D & C 4th 385, 401-03 (Pa. Com. Pl. 1995).

¹⁸⁶ *Jones v. Wolf*, 443 U.S. 595, 603-04 (1979) . See also *infra* notes **-* and accompanying text for further discussion of “neutral principles” in clergy sex abuse cases.

¹⁸⁷ *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (citing *Moses v. Diocese of Colorado*, 863 P.2d 310, 321 (Colo. 1993)). See also *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323-24 (Colo. 1996) (citing same passage); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967, 970 (Conn. Super Ct. 1998) (same); *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 397-98 (N.C. Ct. App. 1998) (same).

¹⁸⁸ See *supra* notes **-* and accompanying text.

¹⁸⁹ *Moses v. Diocese of Colorado*, 863 P.2d 310, 320-21 (Colo. 1993); *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996); *Enderle v. Trautman*. 2001 WL 1820145, *10.

*Enderle v. Trautman*¹⁹⁰ provides a good example of the “no immunity” approach. In *Enderle*, an adult parishioner alleged that she was injured through her adulterous sexual relationship with her pastor. In addition to claims that the pastor had breached his fiduciary duty to her, the plaintiff alleged that the congregation and synod had negligently supervised and retained the pastor. The court denied the summary judgment motions of the congregation and the synod, holding that “determination of whether the defendants negligently supervised or retained Trautman can be made solely in accordance with well-established tort law principles.”¹⁹¹ The court continued: “a determination of whether Olivet and the Synod knew of Trautman’s alleged sexual improprieties and failed to respond adequately to allegations of sexual improprieties would not implicate any interpretation of ecclesiastical principles or doctrine.”¹⁹² The two findings represent the core of the “no immunity” approach – resolution of negligent employment claims in the context of sexual misconduct claims involves only the application of “secular standards” to “secular conduct.”

The problem with the *Enderle* court’s analysis becomes evident in the very next sentence after it declared that proof of defendants’ negligence “would not implicate” matters of religious doctrine. In its summary judgment motion, the synod denied that it had “the authority to supervise or fire Trautman.” The court responded:

The Synod contends that any negligent supervision/retention claim is predicated upon an employer-employee relationship and since it did not employ Trautman it cannot be responsible for his acts. The Court agrees that an employer-employee

¹⁹⁰ 2001 WL 1820145 (D.N.D.)

¹⁹¹ *Id.* at *9.

¹⁹² *Id.* at *10.

relationship is necessary for a finding of supervisory and retention liability. . . . However, whether Trautman was an employee of the Synod is a question of fact properly resolved by a jury.¹⁹³

This “simple” question of fact goes to a profoundly contested question of ecclesiastical polity – the proper relationship between bishops and pastors.¹⁹⁴ And yet the “no immunity” approach treats proof of this relationship as no more important than any other disputed fact in the litigation.

Is such treatment constitutionally appropriate? Or might there be some constitutional limitation on adjudication of negligent employment claims against religious organizations, a limitation that derives from the same principle that has led courts to reject claims for clergy malpractice? Above we noted that courts have uniformly denied plaintiffs’ attempts to state a cause of action for clergy malpractice.¹⁹⁵ Any such action requires the court to recognize as normative a standard of the reasonable cleric. Whether the standard is denomination-neutral, identifying the “reasonable religious professional” or denomination-specific, identifying the “reasonable Greek Orthodox priest,” the problem remains the same: plaintiff will have to put on evidence of the rules governing conduct of the religious office. If this evidence attempts to establish a generic duty of care for all ministers, the court’s adjudication will amount to the wholesale creation of not only the duty but even the categories of generic minister or generic

¹⁹³ Id.

¹⁹⁴ See Chopko, *supra* note **, at __; Mansfield, *supra* note **, at ___.

¹⁹⁵ See *supra* notes **-** and accompanying text.

religion, neither of which has independent reality.¹⁹⁶ If, however, the plaintiff's evidence seeks to establish the standard of care of a "reasonable Greek Orthodox priest," the court will be faced with the specter of dueling theologians, with each presenting a rival account of the priest's office – and requiring the court to decide which of the rivals represents the authoritative interpretation of Greek Orthodox doctrine.

A similar problem faces courts' adjudication of negligent employment claims against religious organizations. The hiring, supervision, and retention of religious leaders are invariably governed by the normative documents or standards of the religious tradition. Deep and long-standing theological differences between and within faith traditions are often made manifest in disputes over the power to select leaders and to exercise authority over the conduct of the ministerial office.¹⁹⁷ And yet adjudication of a negligent employment claim may result in a court imposing a specific resolution to such theological disputes. If supervisory authority is arguably located in the dioceses of a particular tradition, then a diocese may be deemed to have acted unreasonably if it failed to exercise that authority. The operation of tort law, then, effectively requires the religious body to adopt stronger episcopal oversight, even if the extent of such

¹⁹⁶ The Internal Revenue Service, of course, must distinguish religious from non-religious actors and entities. While an assessment of IRS practice in this area is beyond the scope of this article, we think it significant that the IRS's designation of an entity as religious does not impose normative obligations on the entity; the designation simply means that the entity enjoys a favored tax status (one that is generally, though not universally, shared with non-religious charitable institutions). In contrast, a court's determination of a religious professional's standard of care would necessarily involve determination of normative obligations.

¹⁹⁷ A highly influential decision from the federal district court for the Southern District of New York makes the same point: "The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over almost two millenia." *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (SDNY 1991).

oversight is strongly contested within the faith tradition.¹⁹⁸

To determine whether a diocese should be held liable for negligently hiring or supervising a priest, the court will need to decide that the bishop or some other agent of the diocese possessed the authority to hire, supervise, or remove that priest, and that the diocese's agent acted carelessly in exercising that authority. Both of these determinations seem to invite much the same inquiry as that deemed unconstitutional when applied to claims of clergy malpractice. To establish the bishop's authority over the priest, the plaintiff must introduce evidence of such authority from canon law or from the practices of the defendant or other dioceses. To establish the allegedly unreasonable exercise of the diocese's authority, the plaintiff must present evidence of what a reasonable person who possessed that authority would have done – in short, answering the question “what would a reasonable bishop have done?”

These concerns are not speculative, but real. *Moses v. Diocese of Colorado*¹⁹⁹ provides a concrete illustration of litigation that focused on expert testimony about the authority of an Episcopal bishop. The expert testified about the formal and informal authority Episcopal bishops exert within their dioceses. His evidence ranged from details about the bishop's exercise of pastoral care for priests in the diocese, to the bishop's relationship with seminarians preparing for ministry, to the bishop's influence over matters not directly under control of the diocese.²⁰⁰ As in

¹⁹⁸ Schiltz, supra note **, at _____. This concern is especially present when the issue of institutional control is a factual dispute submitted to a jury; as we note below, a jury is likely to assume that the structure of the defendant organization conforms to its expectations (every bishop is a Roman Catholic bishop)

¹⁹⁹ 863 P.2d 310 (Colo. 1993).

²⁰⁰ *Moses*, 863 P.2d at 323-329.

Enderle, the *Moses* court shows no signs of treating this evidence as constitutionally sensitive, and offers the following conclusion to its recitation of the expert’s testimony: “The trial court properly submitted this issue to the jury for determination and the jury found that there was an agency relationship between Father Robinson and the Diocese.”²⁰¹

The *Enderle* and *Moses* decisions represent both substantive and procedural flaws in the “no immunity” approach. The substantive error resides in the courts’ treatment of ecclesiastical structure as an ordinary question of fact. This error is compounded by the courts’ method of resolving disputes about that structure – both courts sent the question to the jury. We think that the attitudes reflected in *Enderle* and *Moses* about the role of juries, in disposing of issues of religious authority and control, are constitutionally troublesome. As is always the case in tort law, juries are seeing these cases from hindsight; they are aware that someone has been injured, and they are in the position of assigning culpability. When religious organizations are defendants, especially in sexual misconduct cases, they may well face a form of jury bias that will lead to the discriminatory imposition of special ecclesiastical liability. Jurors may have expectations, conscious or not, that religious leaders will demonstrate greater virtue than the average person. Moreover, jurors unaware of the particulars of ecclesiastical structure may assume that bishops and other religious officials have, by virtue of their office, considerably more control than they actually do. A judicial posture that religious organizations have no constitutional immunity whatsoever from liability for negligent employment of clergy may thus lead with some predictable frequency to the imposition of undeserved liability for failure to act as a “reasonable religious organization” should. And this, in turn, will inevitably create incentives

²⁰¹ *Id.* at 327.

for religious organizations to reconfigure their structure of authority in ways designed to avoid liability. It is the role of state law in the imposition of that incentive structure that First Amendment norms should address.

b. Categorical Immunity

The second approach is the complete opposite of the first, and holds that any inquiry into a religious entity’s exercise of authority over its leaders unconstitutionally entangles the court with a religious community’s right of self-governance.²⁰² As expressed by the Supreme Judicial Court of Maine in *Swanson v. Roman Catholic Bishop of Portland*,²⁰³

When a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident. The exploration of the ecclesiastical relationship is itself problematic. To determine the existence of an agency relationship based on actual authority, the trial court will most likely have to examine church doctrine governing the church’s authority over [the priest].

.....

Even assuming that the trial court could discern the existence of actual authority without determining questions of church doctrine or polity . . . , constitutional obstacles remain. The imposition of secular duties and liability on the church as a “principal” will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest. . .

²⁰² A number of courts hold that categorical immunity applies only to claims of negligent hiring and/or negligent retention - a distinction that they purport to draw from the “ministerial exception” cases. See, e.g., *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995) (First Amendment bars claim of negligent hiring, but not negligent supervision); *J.M. v. Minnesota Dist. Council of Assemblies of God*, 658 N.W.2d 589 (Minn. Ct. App. 2003) (First Amendment bars scrutiny of church’s hiring decision, but not supervision or retention. It is not clear to us why that distinction should matter: negligent hiring, supervision, and retention all ask essentially the same questions: did the defendant have notice of the wrongdoer’s propensity to commit sexual misconduct, authority to prevent the harm, and some duty of care to those who were harmed? Seen in that light, hiring and retention are simply “moments” along a spectrum of types of a principal’s control over her agents.

²⁰³ 1997 ME 63, 692 A.2d 441.

. Pastoral supervision is an ecclesiastical prerogative.²⁰⁴

Courts in Wisconsin have generally followed the same path as the *Swanson* court, recognizing a categorical prohibition on negligent employment claims against religious organizations, and grounding that recognition in a robust doctrine of non-entanglement.²⁰⁵

The *Swanson* court determined that any judicial inquiry into the distribution of authority within or among religious institutions would require courts to construe religious texts and doctrines.²⁰⁶ Drawing from the US Supreme Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*,²⁰⁷ the *Swanson* court then held that it is constitutionally barred from undertaking any inquiry that depends on the interpretation of religious texts, such as canon law or a congregational charter, because to do so would inevitably impose on the religious organization an external, government-endorsed model of ecclesiastical governance. Under this view, any set of employment standards adopted by the court usurps the religious institution's autonomy to structure its polity in accordance with its own beliefs and practices.²⁰⁸

²⁰⁴ *Id.* at 444-45

²⁰⁵ See *Bryan R. v. Watchtower Bible & Tract Soc'y*, 738 A.2d 839 (Me. 1999); *Napieralski v. Unity Church of Greater Portland*, 2002 ME 108, 802 A.2d 391; *L.L.N. v. Clauder*, 563 N.W.2d 434 (Wisc. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wisc. 1995). Several decisions in New York, involving both federal and state courts, have reached a similar conclusion. See *Ehrens v. Lutheran Church-Missouri Synod*, 269 F. Supp. 2d 328 (SDNY 2003); *Schmidt v. Bishop*, 779 F. Supp. 321 (SDNY 1991); *Langford v. Roman Catholic Diocese*, 271 A.2d 494 (N.Y. App. Div. 2000). But see *Jones v. Trane*, 153 Misc. 2d 822, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992) (permitting negligent hiring and supervision claims against church).

²⁰⁶ *Swanson*, 692 A.2d at 444-45.

²⁰⁷ 426 U.S. 696 (1976) (cited in *Swanson*, 692 A.2d at 444).

²⁰⁸ *Swanson*, 692 A.2d at 445.

The *Swanson* court’s approach, however, fails to acknowledge that, as with claims of professional negligence by clergy, claims of negligent employment may be justiciable under some circumstances. Not every inquiry into the authority of a diocesan Bishop will require the court to resolve disputed questions of ecclesiastical polity, or invite the court to impose a normative form of parish governance.²⁰⁹ If any such inquiry can be conducted without resulting in unconstitutional entanglement, there are sound jurisprudential and policy grounds for allowing courts to determine whether a particular case can proceed.

At the most basic level, plaintiffs often bring compelling tales of profound, lasting injuries from sexual molestation, and the religious institution often represents the only viable source of remedy for the harm they have experienced. Moreover, and notwithstanding our concerns about the imposition of alien structures of authority on religious organizations, the viability of civil actions against religious institutions should make such institutions and their insurers more responsive to concerns about their leaders’ abusive behaviors. By foreclosing all claims of negligent employment by religious organizations, the *Swanson* court’s doctrine of categorical immunity determined that the risk of unconstitutional entanglement outweighs the benefits of recovery to injured plaintiffs and potential reform of socially harmful practices of religious organizations. We believe that such a determination is neither compelled by the Constitution nor a wise exercise of jurisprudence.

ii. An Alternative Approach

The two categorical approaches share one virtue – they are both easy for courts to apply

²⁰⁹ See *infra* notes **.** and accompanying text (discussing use of “neutral principles” to guide construction of religious texts).

in cases alleging negligent employment by religious organizations. One rejects constitutional challenges to the use of traditional tort principles, the other finds that the First Amendment grants complete immunity to religious organizations accused of negligence in their employment practices. Neither approach, however, manages to give a coherent account of why certain claims against religious organizations – most notably clergy malpractice – should be barred, and why others – such as an organ builder’s action against a congregation for breach of a contract to buy an instrument – should be allowed to proceed. From the no-immunity perspective, if “neutral principles” can be applied to determine the character of the authority that a bishop has over a priest, such principles could similarly be developed to adjudicate claims of clergy malpractice. From the no-liability perspective, if courts are constitutionally forbidden to inquire into the polity of a religious organization, how can a court determine whether the organ builder has a contract enforceable against the religious entity, when the contract was signed by individuals who purported to bind the entity?

Courts need – and the Religion Clauses require – an approach that falls somewhere between the categorical analyses outlined above. In the sections that follow, we sketch out several interrelated analyses that attempt to delimit courts’ inquiry into the character and structure of ecclesial authority, while still permitting plaintiffs to hold institutions accountable for the harms that such institutions negligently inflict on those under their care. The problem requires reconciling state-created tort law with the demands of the First Amendment. As all good first amendment lawyers know, such reconciliations have been part of the enterprise of constitutional law since the Supreme Court’s decision in *New York Times v. Sullivan*²¹⁰ almost

²¹⁰ 376 U.S. 254 (1964).

forty years ago. Whether the tort is defamation,²¹¹ invasion of privacy,²¹² or intentional infliction of emotional distress,²¹³ the First Amendment sometimes requires that tort law concerns give way, at least in part, to constitutional considerations. In what follows, we draw in detail on the concerns of substance and process that characterize this methodology of reconciliation. Moreover, we expand on this methodology by revisiting *Jones v. Wolf*,²¹⁴ and focusing on its character as a decision about rules of evidence. So viewed, *Jones* may buttress rather than undermine the case for constitutional limits in cases alleging negligent employment.

a. Reconciling Tort Law and the First Amendment:

Lessons from the Freedom of the Press

As we argued above in critiquing the cases that reject all ecclesiastical immunities in this context, the constitutional problems here may concern the interaction of process and substance – that is, it is the role of juries, in applying general and sweeping standards of care to an employer’s duties to third parties, that represents the threat to First Amendment values. This context is not the only one in which tort law and First Amendment considerations, and the respective roles of judge and juries, must be reconciled. The Supreme Court’s decisions in *New*

²¹¹ *Id.*; see also *Curtis Pub. Co. v. Butts*, *Associated Press v. Walker*, decided together at 388 U.S. 130 (1967) (extending rule of *New York Times* to plaintiffs who are “public figures”).

²¹² *Time, Inc. V. Hill*, 385 U.S. 374 (1967).

²¹³ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

²¹⁴ 443 U.S. 595 (1979).

*York Times v. Sullivan*²¹⁵ and its progeny, *Time, Inc. v. Hill*,²¹⁶ and *Hustler v. Falwell*,²¹⁷ in which potential liability of the press under state law is harmonized with considerations of press freedom, offer provocative analogies from which to draw. The doctrines elaborated in these decisions (which we hereafter describe as the “regime of *New York Times*”) are designed to permit the press to perform its duties robustly, without inhibition borne of the fear of after-the-fact imposition of liability by hostile juries. Similarly, ecclesiastical immunity is designed to give religious organizations “breathing space” within which to organize their own polities, select their own leaders, and preach their own creeds.²¹⁸ The *New York Times* regime contains elements of both substance and process, and we draw on both in teasing out our own recommendations.

1. Substantive standards of liability

a. Knowledge

One highly relevant and particularized way in which the regime of *New York Times* might inform the legal questions we discuss in this part involves the question of whether liability should be limited to those who have actual knowledge of a clergyman’s propensity to commit sexual misconduct, or should be extended to those with constructive knowledge. Under the most robust versions of the constructive knowledge rule, religious entities may find themselves pressured to investigate the backgrounds of those who seek training or employment in their ranks

²¹⁵ 376 U.S. 254 (1964).

²¹⁶ 385 U.S. 374 (1967).

²¹⁷ 485 U.S. 46 (1988).

²¹⁸ At least one court has extended the rule of *New York Times* to defamatory falsehoods uttered during a sermon on divorce delivered as part of a worship service in a church. See *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363 (1988)

of clergy. Failure to do so may give rise to liability for sexual misconduct that juries determine was reasonably foreseeable at a much earlier stage.

If the First Amendment interdicts any system of clergy licensing, as suggested in Part II above, it is arguable that it similarly prohibits a regime of liability that imposes on religious entities a duty to inquire into the psychological makeup of clergy aspirants, and the consequent financial incentive to exclude those whose life details and behavioral profiles suggest a propensity to sexual misconduct.²¹⁹ Such a broad duty may well lead religious entities into a form of self-limitation, or self-censorship, that is inconsistent with the freedom protected by ecclesiastical immunity from official inquiry into the selection of religious leaders.

With respect to the question of culpable states of knowledge, the qualified privilege represented by the regime of *New York Times v. Sullivan* might be of particular value. That rule limits the liability of the press for defamation of public officials with respect to their official conduct to situations in which the defendant acted with “actual malice” - defined in *New York Times* as “knowing falsehood” or “reckless disregard of the truth.” The rationale of *New York Times* is that strict liability in defamation, as the common law imposed, or even a system of negligence-based liability, will lead to self-censorship, with a consequent loss to the public of a press willing to provide information about public officials and their official behavior.²²⁰

²¹⁹ For discussion of this and other effects of sexual misconduct litigation on religious organizations, see Patrick Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. Rev. 949 (2003).

²²⁰ The regime of *New York Times* also extends to press comment on public figures. See *Curtis Pub. Co. v. Butts*, *Associated Press v. Walker*, decided together at 388 U.S. 130 (1967).

In *Gibson v. Brewer*,²²¹ the Supreme Court of Missouri adopted a closely analogous rule for adjudicating claims against religious organizations, where the claims arise out of the organization's employment of one who commits sexual misconduct. The *Gibson* court rejected plaintiffs' claims of negligent employment, holding that adoption of any standard of reasonable care for that conduct "would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention."²²² The court then distinguished claims for "intentional failure to supervise clergy" from those of negligent employment:

A cause of action for intentional failure to supervise clergy is stated if (1) a supervisor (or supervisors) exists, (2) the supervisor (or supervisors) knew that harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the supervisor's inaction caused damage, and (5) the other requirements of the Restatement (Second) of Torts, section 317 are met. This cause of action requires a supervisor. The First Amendment does not, however, allow a court to decide issues of church government – whether or not a cleric should have a supervisor.²²³

The *Gibson* court's twofold focus on actual, rather than constructive knowledge and actual, rather than constructive authority, parallels closely the concerns expressed in the regime of *New*

²²¹ 952 SW2d 239 (Mo. 1997).

²²² *Id.* at 247. The court reaches the same conclusion with respect to negligent supervision: "Adjudicating the reasonableness of a church's supervision of a cleric – what the church "should know" – requires inquiry into religious doctrine. . . . [T]his would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision." *Id.* Quite provocatively, the *Gibson* court also said that the clauses in Missouri's state constitution "'declaring that there shall be a separation of church and state are not only more explicit but more restrictive' than the First Amendment." *Id.* at 246 (quoting *Paster v. Tussey*, 512 SW2d 97, 101-02 (Mo. 1974)). The *Gibson* court does not address the state constitution, because it said that neither party had raised Missouri's religion clauses. If part of the constitutional defect in plaintiffs' claim falls under the state disestablishment provision, and thus represents a defect of the court's subject matter jurisdiction, the court certainly would have the authority to raise the provision *sua sponte*, but the court did not do so.

²²³ *Id.* at 248.

York Times.²²⁴

In the defamation context, the privilege created by *New York Times* protects the press as an instrument of control over the actions of government, at the potential expense of the reputation of officials. The press is free to publish unless it knows the story to be false and defamatory, or is in possession of information creating a high probability that the story is false and defamatory. In the context of clergy sexual misconduct, a requirement that plaintiffs show the defendants had actual knowledge of their employees' propensity to commit misconduct is strongly analogous to the requirement of knowing falsehood in defamation; both involve a highly culpable form of *scienter* as a basis for liability. Similarly, if agents of a religious organization had facts readily available to them that indicated a significant risk of sexual misconduct, and yet took no relevant action, their action might be seen as a "reckless disregard" of the likelihood of harm. When a clergyman spends "too much" time alone with adolescent boys, or flirts provocatively and excessively with attractive women in his congregation, supervisors will not be able to ignore the clergyman's conduct. Any broader version of constructive knowledge of propensity for sexual misconduct, however, would function like liability for negligence or perhaps even like strict liability. Such liability standards, if internalized by religious entities, would require expensive and sweeping precautions about whom to train and ordain, and would tend to function as an externally imposed, though self-enforced, scheme of clergy licensing.²²⁵

²²⁴ The Missouri Supreme Court's approach in *Gibson* has been followed in at least one other jurisdiction. See *Heroux v. Carpentier*, 1998 R.I. Super. LEXIS 52. See also *Chopko*, *supra* note **, at 1119.

²²⁵ We recognize that in other respects, the *New York Times* analogy may be off the mark. First, the *New York Times* rule is limited to cases in which the plaintiffs are public officials, or public figures, who can fairly be said to have assumed some of the risk of defamatory publicity.

One significant objection to extending the “actual malice” rule to claims of negligent supervision by religious entities is the disincentive such a rule may create to investigate, and respond to, hints of sexual misconduct by clergy. Under the regime of *New York Times*, the press may have such a disincentive to more fully investigate stories that are potentially defamatory. This disincentive would arise from a fear of learning information that might make a story appear to be “knowingly false,” or to have been published in “reckless disregard of the truth.”²²⁶

We do not dismiss this concern lightly, but we believe that structural qualities of religious institutions are likely to lead them to respond differently than press organizations to signs of danger. The press writes about strangers, operates on short time lines, and is in the business of selling copy. Whatever its institutional concerns about accuracy, fairness, and reputation, the press frequently lacks sufficient incentive to self-correction. By contrast, clergy misconduct involves mistreatment of adherents to a faith community, and sex scandals leave an enduring stain on the affected institutions and individuals. When rumors float upward, we expect that incentives to ameliorate the problem will frequently overcome the liability-avoiding disincentives to investigate.

b. The relationship between culpable knowledge and authority over the offending employee.

In contrast, plaintiffs in sexual misconduct cases – especially those in which the clergy misbehavior is criminal – cannot be said to have consented to such risks. The case for assumption of risk is at least somewhat more plausible in cases of adult counseling, but even there we cannot say that plaintiffs assume risks analogous to those of bad publicity assumed by public officials and public figures. We note, however, that the *New York Times* regime extends to “private figure” lawsuits for invasion of privacy, and that courts may award punitive damages in defamation cases brought by “private figures” only upon a showing of actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²²⁶ 376 U.S. at xxx.

Adjacent to the issue of the quantum of knowledge necessary for liability lies the question of who possesses it – that is, whether the person alleged to have the requisite knowledge of risk also has the responsibility and authority to act on that knowledge. Imagine, for example, that a manager at the Buick Division of General Motors lives next door to an employee of a Chevrolet dealer, a firm which is in a contractual relationship with GM. The Buick employee knows that his neighbor has a tendency to drink at lunch and then drive autos around the Chevy dealer's parking lot. If the Chevy employee's drinking and driving leads to an accident on the Chevy dealer's premises, the law would not impute knowledge of, and legal responsibility for, the accident to General Motors. The common affiliation of Buick and Chevrolet with General Motors would not make GM legally culpable on these facts, because the business relationship among the various parties would not support the imputation of knowledge from the Buick manager to the Buick Division, and then from Buick to GM, nor would it support the legal responsibility of GM for the accident on the lot of an independent contractor.

In some circumstances, such questions of the coincidence (or lack thereof) of knowledge and authority may raise constitutional questions. In the context of defamation, for example, the First Amendment may require limits on whose knowledge may be attributed to the defendant organization. The press acts through agents and employees, and ordinarily a suit for libel would focus on what the reporters, editors, fact-checkers and others involved in the subject matter of a story knew at the time of publication. Suppose, however, that someone far removed from the preparation of a story, but within the press organization – say, someone working in the printing plant across town from the editorial offices -- had knowledge of a story's falsehood.

Would it violate the First Amendment to impute such a person's knowledge to her

defendant-employer? We know of no judicial decision on facts of this character, but the constitutional argument is not hard to develop. If the defendant's "state of mind" includes the states of mind of all of the defendant's agents, including those who have nothing whatsoever to do with the story, the organization would have a liability-driven incentive to take expensive and time-consuming steps to clear every story it published with everyone who works for it.

Moreover, the problem of imputed knowledge, liability risk, and self-censorship would be that much greater if it extended to the defendant's organizational affiliates. Assume that USA Today, a Gannett publication, was under a civil obligation to clear potentially defamatory stories with every employee of every newspaper in the Gannett chain in order to be sure that no one in the organization had actual knowledge of the story's falsehood, or information that would suggest that publication is in "reckless disregard of the truth." Once the imputation of knowledge is allowed to spread that far, no editor could ever be sure that his news organization was safe from a successful libel suit in a matter where the facts are contested and uncertain. The probable chilling effect of such a rule on major news organizations would be obvious. Under such a regime of tort liability, they would be inclined to refrain from publishing anything that was potentially defamatory, or reorganize their processes in complex and expensive ways in order to avoid the possibility of such liability.

However farfetched such concerns may be when applied to questions of libel, where the risk of the knowledgeable but otherwise uninvolved employee may appear remote, they are anything but fanciful in the context of religious organizations being called upon to answer for negligent supervision of clergy. Any claim of negligent supervision must include an assertion that the employer knew, or should have known, of the risk that the offending employee would

cause harm. Even within a religious organization that is organized along simple lines, the question of imputation of knowledge from someone within the organization to the entity itself may be quite difficult. If, acting collectively, a Baptist congregation hires a particular pastor, and one person within the congregation knows of – but does not disclose – past sexual misbehavior with minors by the new pastor, has the congregation engaged in actionable negligent hiring? Only if the knowledge of one is imputed to all would a conclusion in favor of liability be sound.

To make matters considerably more difficult, religious organizations frequently have idiosyncratic and complex organizational forms.²²⁷ Consider the LDS Church, in which all adult males in good standing are members of a lay, unpaid priesthood. May the knowledge that any one of them may have of the sexual proclivities of another be imputed to their local congregation, to their Bishop, to the stake president to whom the Bishop reports, or to the Corporation of Presiding Bishops in Salt Lake City?²²⁸ If liability may result from imputation of such far-flung knowledge, religious organizations will come under tremendous pressure of one or both of two kinds. They may impose elaborate, expensive, and rigid systems of surveillance and reporting on all of their clergy, in order to ensure that those in a position to remove potential or actual offenders really do know everything that will be imputed to them. Alternatively, or cumulatively, they may adopt a tremendously thick initial screen on those who seek the status of

²²⁷ Mark Chopko has done the most comprehensive work on the relationship between the complexity of religious organization and issues of liability. In addition to his article in the *Boston College Law Review*, note xx supra, see Mark Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 *Am. J. Trial. Advoc.* 289 (1993).

²²⁸ Our knowledge of the organization of the LDS Church derives primarily from Frederick Mark Gedicks, *Church Discipline and the Regulation of Membership in the Mormon Church*, xx *Eccles. L. J.* 31, 31-33 (200x).

clergy or priest. Either way, they will have responded to the risk of liability by changing the structure of their organization or their criteria for the priesthood. For reasons we have elaborated above, law-driven reforms in either of these directions are constitutionally troublesome.

In order to avoid constitutional problems of this character, courts adjudicating claims of negligent hiring, supervision, or retention must follow a few simple but significant rules. First, the legal judgment about who is the employer of a particular member of the clergy must be made using criteria identical to those utilized in analogous secular settings. Just as GM should not be responsible for the actions of an employee of a Chevy dealer, even if the dangers were known to an agent of the Buick Division, a religious organization that is affiliated by name with many congregations, but does not control their hiring, supervision, and retention of clergy, should not be held liable for the behavior of a congregational employee.

Second, this result should not change even if an employee of the larger organization has actual knowledge of the relevant risk. Liability in these cases should turn on a conjunction of knowledge and supervisory authority. Just as we argued in the preceding section that authority without knowledge should not be sufficient to create liability, so we suggest here that knowledge of risk, without legal authority to act on it, is similarly insufficient.

The concern that knowledge, unaccompanied by legal authority to act, should not permit the imposition of tort liability involves more than a constitutionally-inspired insistence on even-handed treatment of religious and secular entities. Beyond that constitutional worry lies a matter of policy and practice that moves many religious entities, as well as some secular organizations – that crisis intervention by institutional leaders not be the predicate of liability for their organizations. As long reflected in tort law policies concerning good samaritans, and as reflected

above in our discussion of institutional fiduciary duty, the imposition of liability on those who intervene voluntarily to minimize harm will tend to discourage ameliorative steps. A similar concern attends the imposition of negligence liability on those who seek knowledge about wrongdoing within their ambit of institutional concern. If acting in this way leads to actual knowledge that a clergyman presents a risk of sexual misconduct, but the acquirer of that knowledge invites personal or institutional liability once the knowledge is in his possession, he may be disinclined to seek the truth and to act correctively through the use of influence or persuasion rather than legal authority. Legal standards should not discourage this sort of effort.

Thus, for reasons of both constitutionality and policy, we strongly recommend that the adjudication of claims of negligent hiring, supervision, and retention of clergy employees be accompanied by constitutionally sensitive methods of deciding who within a religious organization had authority to act in the requisite ways. On this point, we have no substantive recommendation analogous to the “actual malice” rule on the question of requisite knowledge. Instead, we urge in the next two sections of this paper that constitutional awareness be manifested in concerns of process.²²⁹ In particular, courts may demonstrate the requisite sensitivity to the issue of authority to supervise in their decisions allocating power between judges and juries, in doctrines concerning evidentiary sources, and in jury instructions that are tailored to the relevant constitutional concerns.

2. Processes of Adjudication and the First Amendment

The regime of *New York Times v. Sullivan* is not one of substance alone. From *New York*

²²⁹ For comparable argument with respect to freedom of speech and press, see Henry P. Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. ____ (1969).

Times onward, the Supreme Court has been concerned about the problem of jury bias in application of First Amendment norms in defamation cases. The rule of “actual malice” will do little good in protecting press freedom if juries, acting to protect their neighbor’s reputation, can systematically disregard the rule and bring in verdicts against the press.

Accordingly, the Court has created in defamation cases a series of process rules designed to allocate power to judges, entrusted with constitutional values, and away from juries. In *New York Times* itself, the Court ruled that “the proof presented to show actual malice lacks the convincing clarity that the constitutional standard demands,”²³⁰ and thus “would not constitutionally sustain the judgment”²³¹ against the Times; the case was thus remanded for dismissal rather than a new trial. In subsequent decisions, the Court has reinforced this requirement that proof of “actual malice” must rest on clear and convincing evidence;²³² that trial judges should lean towards granting summary judgment to press defendants in cases where the evidence of actual malice that would go to the jury cannot reasonably be said to be clear and convincing;²³³ and that appellate courts should scrutinize the record in defamation cases to be sure that they properly went to the jury under these standards.²³⁴ Coincidentally with and in support of this structure of decisionmaking, the Court in *Hebert v. Lando*²³⁵ approved of broad

²³⁰ 376 U.S. at ____.

²³¹ *Id.* at ____.

²³² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

²³³ *Id.*

²³⁴ *Bose Corp. Consumers Union*, 466 U.S. 485 (1984).

²³⁵ 441 U.S. 153 (1979).

freedom for defamation plaintiffs to engage in discovery designed to ferret out evidence of actual malice; if that is to be the controlling constitutional standard, the Court reasoned, plaintiffs must be free to inquire into editorial processes in order to demonstrate that the press defendants indeed knew that the information was false or that there was a high probability that it was false.

These process rules, designed to permit plaintiffs to prove their cases but to protect the press against juries that may be insensitive to the concerns reflected in constitutional rules of privilege, might play a comparable role in lawsuits alleging the negligent employment of clergy who commit acts of sexual misconduct. If a rule of “actual employer knowledge” were to be adopted for such cases, the procedural apparatus of defamation cases – full opportunity to discover relevant knowledge, requirements of evidentiary clarity, and corresponding practices for summary judgment and appellate review – might well be appropriate for this category of litigation.

Even beyond substantive issues of degree of awareness of clergy proclivities by organizational defendants, however, these sorts of judicial controls might be more widely deployed in such cases. As we note above, a crucial question in many of the negligence cases brought against religious entities is that of the authority of the entity to take action with respect to a member of the clergy, even if the entity’s agents have actual knowledge of the danger. The combination of the inability of juries to appreciate the nuances of ecclesiastical structure with jury expectations of the virtuous character of such organizations has made processes of jury trial treacherous indeed for organizational defendants.²³⁶ In particular, juries should not be left to

²³⁶ See *Byrd v. Faber*, 57 Ohio St. 3d 56, 61-62, 565 N.E.2d 584, 589-90 (Ohio 1991) (imposing standards for specificity of pleading in negligent employment cases because of danger of excessive entanglement with religious organization).

draw their own unguided conclusions about the authority reposed in an officer with the title of “Bishop,” or other comparable title suggesting hierarchical authority.

In light of the danger that negligent employment claims pose to the freedom to structure ecclesiastical arrangements free from state prescription or interference, judges might assume extraordinary control of such cases. In particular, judges might take it upon themselves to inspect the evidence of supervisory authority, in order to be sure that the evidence to support a finding of requisite authority is sufficiently clear and convincing that the question should appropriately go to the jury.

We recognize that this recommendation is one of process alone, and that substantive constitutional questions remain concerning the sources of such evidence, and the permissibility of considering them in determining issues of knowledge and control. Whatever the form of the evidence, the role of the judge in such cases should be to ensure that juries will impose liability only on the basis of actions that create unreasonable risks in light of the actual structure of the defendant religious organization, understood as much as humanly possible in secular terms. Juries should not be free to decide what constitutes a reasonable structure for a religious organization, and judges should scrupulously withhold from juries those questions which effectively ask whether a religious community has organized itself in reasonable ways.

The First Amendment doctrine of ecclesiastical immunity is designed to remove from state cognizance precisely those questions. If judges do not understand the contours of such a forbidden inquiry, they will be unable do their job in ensuring that the state and its decision-making processes stay clear of it. The subtleties attached to these questions are considerable, and we hope that our attention to them will invite more nuanced consideration than they have

received to date.

b. Neutral Principles and Evidentiary Sources

Faced with claims that a religious institution has failed to exercise due care in the selection or management of its clergy, courts frequently ask whether “neutral principles of law” can be applied to resolve the dispute. The concept of “neutral principles” refers to an analytic model accepted by the Supreme Court, in *Jones v. Wolf*,²³⁷ as a way of resolving disputes over the ownership and control of religious institutions’ property. As we saw above, courts that invoke the concept of “neutral principles” typically, and with little or no explanation, restate the concept as “the application of secular standards to secular conduct.”²³⁸ Finding that the tort law analysis of negligent employment is a “secular standard,” courts then proceed use that analysis to measure the performance of religious organizations.²³⁹ A close examination of the Supreme Court’s decision in *Jones v. Wolf*, however, reveals an inquiry that is markedly different from the one undertaken by most courts in the context of clergy sex abuse.

Jones v. Wolf was the penultimate chapter in a long story of conflict within Presbyterian churches in Georgia.²⁴⁰ In the mid-1960s, several congregations that belonged to the Presbyterian Church USA (PCUSA) withdrew from that body and joined the Presbyterian Church in America (PCA). The PCUSA decided, through its adjudicative process, that ownership of the local

²³⁷ 443 U.S. 595 (1979).

²³⁸ See text at notes **-* and cases cited therein.

²³⁹ See text at notes **-* and cases cited therein.

²⁴⁰ In *Jones v. Wolf*, the Supreme Court remanded the case to the Georgia courts to clarify whether their decision to award the property to the local congregation was based on a standard legal presumption of majority rule. 443 U.S. 595, 606-08.

congregations' property should remain with the national body. When the PCUSA attempted to assert control over the local church properties, the congregations brought suit to establish their rights to ownership.

In *Presbyterian Church v. Eastern Heights Presbyterian*, the Supreme Court of Georgia decided that the property should remain with the local congregations.²⁴¹ The Georgia court found that the local congregational property was held in an implied trust for the national church; ordinarily, such a finding would require deference to the national body's decisions about the property.²⁴² In this case, however, the court determined that the national body had breached the implied trust through its "substantial abandonment of, or departure from, the original tenets of faith and practice. . . ."²⁴³ The U.S. Supreme Court reversed, holding that the Constitution prohibits courts from determining whether a religious community has "substantially abandoned" its faith.²⁴⁴ Adjudication of disputes within religious organizations, the Court held, must not turn on resolution of ecclesiastical questions.²⁴⁵ Instead, "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches

²⁴¹ *Presbyterian Church v. Eastern Heights Church*, 224 Ga. 61, 159 SE2d 690 (1968), reversed by *Presbyterian Church v. Hull Church*, 393 US 440 (1969).

²⁴² 159 S.E.2d at 695-96.

²⁴³ *Id.* at 701. The actual holding was slightly more complicated, but no more constitutionally appealing: the Georgia court held that the question of the national church's departure from doctrine was one that properly went to the jury for determination. *Id.*

²⁴⁴ *Presbyterian Church v. Hull Church*, 393 US 440 (1969).

²⁴⁵ *Id.* at 449-50.

to which property is awarded.”²⁴⁶

On remand, the Supreme Court of Georgia abandoned its doctrine of implied trust , and held that it now would adjudicate such disputes by examining the traditional documents used to resolve any dispute over title to property.²⁴⁷ The Georgia court then found that the deeds to the church properties in question made no mention of any express trust or other interest benefitting the national church, and so reaffirmed ownership in the local congregations.²⁴⁸

Jones v. Wolf involved a very similar controversy within a Presbyterian congregation, although in this case the local congregation was divided, and the majority faction decided to remove the congregation from the PCUSA and join the PCA. The minority faction of the congregation appealed to the PCUSA, which held that ownership of the church property should remain with the minority faction. The parties brought the dispute before the civil courts, and, following the “neutral principles” approach adopted on remand in *Presbyterian Church v. Eastern Heights Presbyterian*, the courts examined the relevant deeds, corporate charters, and other church documents, and found no grant of an express trust to the national body. The Georgia courts confirmed ownership of the property in the majority faction of the congregation.

The US Supreme Court affirmed the approach taken by the Georgia courts, but remanded for clarification of the reason that the trial court had awarded the property to the majority

²⁴⁶ Id. at 449.

²⁴⁷ *Presbyterian Church v. Eastern Heights Presbyterian*, 225 Ga. 259; 167 S.E.2d 658 (1969).

²⁴⁸ Id. at 659-660.

faction.²⁴⁹ In approving the “neutral principles” analysis adopted by the Georgia courts, the Court wrote:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general— flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.²⁵⁰

Using neutral principles of property and trusts law, courts can examine documents relating to control of the property – including “religious documents, such as a church constitution”²⁵¹ – to determine ownership. Any judicial inquiry into such documents requires “special care” to ensure that the court’s interpretation can be done “in purely secular terms.”²⁵²

Many, including Justice Rehnquist, have questioned whether the “neutral principles” approach should be applied outside the context of church property disputes.²⁵³ We earlier quoted

²⁴⁹ Jones v. Wolf, 443 U.S. at 607-08.

²⁵⁰ Id. at 603-04. Professor Greenawalt raises serious questions about the extent to which the neutral principles approach actually respects the intention of the members of religious communities. Greenawalt, *supra* note **, at 1901-04.

²⁵¹ Jones v. Wolf, 443 U.S. at 604.

²⁵² Id.

²⁵³ See *General Council on Finance and Administration v. Calif. Super. Ct.*, 439 U.S. 1369, 1372-73 (1978) (Rehnquist, Circuit Justice, denying application for stay). See also CITE.

Justice Rehnquist’s opinion in denial of a stay in a case involving a religious nursing home, in which he stated that “the Court never has suggested that those constraints [imposed on resolution of church property disputes] similarly apply outside the context of such intraorganization disputes.”²⁵⁴

There are at least two reasons for questioning Justice Rehnquist’s conclusion. First, Justice Rehnquist opposed special protections for religious institutions even in the context of internal disputes,²⁵⁵ so he would not be likely to extend such protections to external disputes. Second, the boundary between internal and external disputes is less clear than one might think. Disputes over the appointment or retention of a priest seem internal, but a cleric who alleges that she was wrongfully terminated does not look much different from others who bring tort claims against the church. Indeed, disputes over the ownership of church property cannot be considered purely internal. In *Jones v. Wolf*, the minority faction was literally external – barred from use of a church to which many of them had contributed.

Even if one recognizes that the First Amendment has some application to “external” disputes involving religious organizations, one still might believe that the “neutral principles” approach should be restricted to disputes within religious communities over ownership of real property. As developed by the Georgia courts and approved by the U.S. Supreme Court, the neutral principles approach focuses heavily on interpretation of written evidence – and especially legal documents, such as deeds and corporate charters – to determine the parties’ relative legal

²⁵⁴ *General Council on Finance and Administration v. Calif. Super. Ct.*, 439 U.S. at 1372-73.

²⁵⁵ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, xxx (1976). (Rehnquist, J. dissenting).

interests in the disputed property. This almost exclusive focus on documents is entirely appropriate in the context of real property; the Statute of Frauds requires that any creation or conveyance of an interest in property must be done in a signed writing.²⁵⁶ No such evidentiary limitation applies in most tort cases, in which resolution of the claim requires the court to consider all relevant evidence, including parties' patterns of conduct that may directly contradict their written authority.

We may, however, glean from the neutral principles approach some guidelines for dealing with a wider range of disputes, including tort claims, involving religious organizations. The neutral principles approach has two central limitations on the scope of admissible evidence. First, to avoid the constitutional error of imputing to religious organizations patterns of authority that they have not chosen, courts might strictly limit the introduction of testimony intended to show patterns of conduct that contradict the organization's written allocations of authority. Even if such testimony might be useful in determining what really happened in a given dispute, courts should be concerned that the jury will disregard the formal structure of a religious entity, and – either out of prejudice against the organization, or a desire to provide a remedy for the victim – impose its own views of the responsibilities that a religious organization should bear for misconduct by those who speak in its name.

Second, in looking to the religious organization's documents to determine the respective rights and obligations of and within a religious organization, the court should examine only those materials that can be interpreted in secular terms. If the burden of persuasion rests on the

²⁵⁶ See, e.g., Official Code of Georgia, § 13-5-30 (2003) (contracts required to be in writing).

plaintiff, courts should look for clear statements of specific kinds of authority to supervise clergy.

In the context of claims that religious organizations failed to exercise due care in their employment practices, the reconsidered doctrine of neutral principles would thus permit the most constitutionally sensitive determinations to be made by the judge on a motion for summary judgment, rather than sending those determinations to the jury. By examining the documents that create or reflect a religious entity's structures of authority, the court could determine whether a particular official or body had the power to hire, supervise, or retain a particular individual. As with the neutral principles approach in the context of property disputes, this examination has the decided virtue of letting the religious organization determine its own patterns of authority. The court would avoid the constitutional problem of imposing on the entity an alien polity.

We can identify at least three reasons that this reconsidered application of neutral principles is less than perfect. First, despite *Jones v. Wolf*, this application cuts directly against the basic intuition of many courts, which have intentionally excluded consideration of the religious community's documents, in the belief that any interpretation of the responsibilities reflected within such documents would unconstitutionally entangle the court in the religious community's affairs. Second, the approach might work with institutions that have developed formal patterns of interaction, but many religious communities have unwritten and even fluid structures, which then cannot be assessed under this reconsidered doctrine. Exclusive reliance on documents rather than practices to prove authority thus can be more than a presumption, designed to govern only when documentary evidence is available. Third, even in religious communities that have a codified structure, a review of documents may not eliminate all of the ambiguities present in our current methods of determining the powers and duties of a particular

office or body. In property cases, such ambiguity can be resolved by recourse to the default norm – absent express evidence to the contrary, property belongs to the holder of record – but that is not the case when the dispute involves the authority of a position. Nonetheless, we believe that this evidenced-centered conception of the doctrine of neutral principles may be a useful approach for courts to apply in those cases where formal documentation of rights and duties is available.

3. Vicarious Liability of a Religious Organization for its Agent’s Sexual Misconduct

Plaintiffs in cases of sexual misconduct routinely claim that the wrongdoer’s religious organization should be held vicariously liable for the wrongdoer’s acts.²⁵⁷ The claim of vicarious liability – typically referred to as *respondeat superior* – does not allege fault on the part of the religious organization, but only that the wrongdoer was an agent of the organization, and that the wrong involved acts that fall within the scope of that agency.²⁵⁸ The doctrine of *respondeat superior* rests on a variety of grounds. Because the organization – the principal – reaps the

²⁵⁷ The most sophisticated commentary on issues of the vicarious liability of religious organizations is that of Mark Chopko. See Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. Rev 1089 (2003); Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 Amer. J. Trial Advocacy 289 (1993). See also Carl H. Esbeck, *Tort Claims Against Churches & Ecclesiastical Officers: The First Amendment Considerations*, 89 W. Va. L. Rev. 1 (1986).

²⁵⁸ Restatement (Second) of Agency § 219. In at least two different ways, claims of vicarious liability can become intertwined with allegations of negligence. First, plaintiffs can claim that defendant-organization should be deemed to have ratified the wrongdoer’s conduct because it failed to take action to disavow or report the wrong, or to mitigate plaintiff’s harm. Restatement (Second) of Agency § 82; *Gagne v. O’Donoghue*, 1996 Mass. Super. LEXIS 481. Second, a number of statutes relating to sexual exploitation by psychotherapists have provisions that hold the therapist’s employer liable for such exploitation if the employer has failed to investigate the wrongdoer’s employment history. Minn. Stat. § 148A.03(a) (quoted in *JM v. Minnesota District Council of the Seventh-Day Adventists*, 658 N.W.2d at 595).

benefit of its agent's work, the principal should also bear the costs of that agent's work, including harms imposed on third parties through the agent's performance of his work. As a matter of policy, it also seems reasonable to impose that burden on the principal, because the principal typically has the financial means to pay claims resulting from the agent's misconduct and the ability to obtain insurance that will cover such claims.²⁵⁹

Plaintiffs rarely succeed in their claims that a religious organization should be held vicariously liable for its agent's sexual misconduct. In most of the cases in which plaintiffs assert claims of vicarious liability, the court skips over the question of whether the wrongdoer was an agent of the defendant, because the court finds that the plaintiff cannot prove that the tortious behavior was within the scope of a cleric's agency – regardless of who employed the cleric.²⁶⁰ Courts in a significant majority of jurisdictions have held, as a matter of law, that sexual misconduct is not within the scope of a religious leader's employment by a religious organization. Such misconduct is, these courts hold, motivated by the wrongdoer's desire for "personal gratification."²⁶¹ Although courts tend to reach this legal conclusion with little explanation, it is logically connected with plaintiffs' claim that the sexual abuse represents a breach of the cleric's fiduciary obligations. In alleging that the clergyman breached his duty of loyalty by taking personal advantage of the relationship, the plaintiff at least implicitly claims that the clergyman has put his own desires above his professional responsibilities – in short, that

²⁵⁹ Restatement (Second) of Agency § 219 Comment a.

²⁶⁰ See, e.g., *Moses v. Diocese of Colorado*, 863 P.2d 310, 329-30 (Colo. 1993).

²⁶¹ *N.H. v. Presbyterian Church (USA)*, 998 P.2d 592, 599 & n.30 (Ok. 1999) (holding that, as a matter of law, sexual misconduct is not within the scope of pastor's duties, and listing other jurisdictions in which courts have reached the same conclusion).

the cleric has ceased to serve his principal. This, of course, is the legal description of acts that fall outside the scope of an actor's agency.²⁶²

Several courts, however, have allowed plaintiffs to proceed on claims of vicarious liability against religious organizations for the sexual misconduct of their agents. Most of these decisions follow *Doe v. Samaritan Counseling Center*,²⁶³ in which the Supreme Court of Alaska said that a plaintiff could assert a claim of vicarious liability against a counseling center that employed the pastoral counselor, whom she accused of sexual misconduct in a counseling relationship. The court held that the wrongdoer's "motivation to serve" the employer is not a prerequisite to a finding of vicarious liability. "[W]here tortious conduct arises out of and is

²⁶² See Restatement (Second) of Agency § 228(2) ("Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master"). In other jurisdictions, courts have denied vicarious liability on facts that are intertwined with the limited situations in which parishioners may bring suit against the cleric for sexual misconduct. For example, in *Hawkins v. Trinity Baptist Church* (30 S.W.2d 446 (Tex. Ct. App. 12th Dist. 2000)), a Texas appellate court permitted plaintiff to bring a tort claim for sexual misconduct against a pastor from whom she received marital counseling, but allowed the claim only because the content of the counseling was secular. *Id.* at 452 (finding that plaintiff stated a cause of action under Texas Sexual Exploitation by Mental Health Services Provider Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 81.001 - 81.009). The court then found that such secular counseling was outside the scope of the pastor's employment; the church authorized only religious teaching and counseling, and had no notice that the pastor was offering secular counseling. *Id.* at 452. See also *Hodges v. Kleinwood Church of Christ*, 2000 WL 994337 (Tex. Ct. App. 1st Dist. 2000) (same); *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998) (same).

²⁶³ 791 P.2d 344 (Alaska 1990). Cited in *Enderle v. Trautman*, 2001 U.S. Dist. LEXIS 20181 (D.N.D.); *Patel v. Himalayan Int'l Inst. of Yoga Sci. & Philosophy of the United States*, 1999 U.S. Dist. LEXIS 22532 (M.D. Pa.). The Supreme Court of Alaska subsequently overruled portions of its decision in *Samaritan Counseling*. *Veco v. Rosebrock*, 970 P.2d 906 (Alaska 1999) ("In [*Samaritan Counseling*] we stated the 'motivation to serve' test would be satisfied 'where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities.' To the extent that this language suggests that the employee's act need not be motivated in fact at least to some degree to serve the master's business we disapprove of it").

reasonably incidental to the employee’s legitimate work activities, the ‘motivation to serve’ test will have been satisfied.”²⁶⁴ In the counseling context, the court held, sexual misconduct can be seen as the counselor’s mishandling of the “transference phenomenon,” which is a normal part of the counseling relationship. Seen in that light, the misconduct is a normal – if unfortunate – aspect of the employer’s business, and the costs of the harm can justly be imposed on the employer.²⁶⁵

As long as the test for vicarious liability is applied neutrally to religious and non-religious entities, the *Samaritan Counseling* court’s expansive interpretation of that test does not raise special constitutional problems when applied to religious organizations.²⁶⁶ If the underlying tort claim against the employee survives constitutional scrutiny, then the identity of the one upon whom the remedy is imposed – whether agent or principal – is a matter without constitutional significance.²⁶⁷

The few courts that have addressed the wrongdoer’s status as an agent find that proof of

²⁶⁴ *Id.* at 348. Overruled by *Veco v. Rosebrock*, 970 P.2d 906 (Alaska 1999).

²⁶⁵ *Id.* at 348-49. See also *Mullen v. Horton*, 46 Conn. App. 759, 700 A.2d 1377 (1997) (plaintiff alleges sexual exploitation by priest-psychotherapist; court permits vicarious liability claim to go forward because “a trier of fact could reasonably find that the sexual relations between [the priest] and plaintiff grew out of, and were the immediate and proximate results of, the church sanctioned counseling sessions.” 700 A.2d at 1381).

²⁶⁶ See generally, Timothy E. Allen, Notes & Comments: The Foreseeability of Transference: Extending Employer Liability under Washington Law for Therapist Sexual Exploitation of Patients, 78 Wash. L. Rev. 525 (2003); Linda Mabus Jorgenson, Pamela K. Sutherland, and Steven B. Bisbing, Transference of Liability: Employer Liability for Sexual Misconduct by Therapists, 60 Brooklyn L. Rev. 1421 (1995).

²⁶⁷ See *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 657 N.W.2d 569, 576-77 (Min. App. 2003) (neutral principles guide judicial definition of the scope of vicarious liability).

an agency relationship may proceed because the inquiry involves only neutral principles of law.²⁶⁸ In *J.M. v. Minnesota District Council of the Assemblies of God*, the Court of Appeals of Minnesota held that plaintiff could establish a minister's employment status through factors that courts apply to determine employment in any context:

(1) the right to control the means and manner of performance; (2) the mode of payment; (3) furnishing of materials and tools; (4) control of premises where work is performed; and (5) right of the employer to hire and discharge.²⁶⁹

The second, third, and fourth factors are clearly susceptible of proof by “neutral principles of law”; a court should be able to determine whether the defendant organization paid for the wrongdoer's services, provided the means through which the wrongdoer performed his work, and controlled the place(s) where that work was performed. As we argue above, however, proof of the first and fifth factors – the power to hire, supervise, and retain – may well draw the court into complex and perhaps contested questions of ecclesiastical polity, questions that are not so readily solved through application of “neutral principles.”²⁷⁰ Many religious traditions have multiple layers of authority, with very different types of relationships between the layers.

Even if judicial determination of which entity has the powers to hire, supervise and retain is constitutionally problematic when the plaintiff claims that a religious institution has been

²⁶⁸ *JM v. Minnesota District Council of the Assemblies of God*, 658 NW2d 589, 595-96 (Minn. App. 2003).

²⁶⁹ *Id.* See also Restatement (Second) of Agency, § 220 (listing factors for determining when actor is a servant).

²⁷⁰ See *supra* notes **-* (discussing claims of negligent employment made against religious entities).

negligent in its performance of those functions,²⁷¹ the constitutional problem might be avoidable when the court is analyzing a claim of vicarious liability. Assume, for example, that a cleric has sexually molested a minor in his congregation, and sued the cleric's congregation, diocese, and religious order under a claim of vicarious liability. Assume also that the court has said that such misconduct could be considered within the scope of the cleric's employment. Adjudication of the vicarious liability claim does not require the court to find that any particular entity failed to use due care in exercising its authority over the cleric, so the court does not have to determine the precise extent of authority possessed by any single entity.

Instead, the court can avoid that constitutionally sensitive determination by asking a simpler question, and one that is regularly applied by the Internal Revenue Service: was the wrongdoer an employee or an independent contractor?²⁷² If the cleric is deemed to be an independent contractor, then the claim of vicarious liability fails by definition. If, on the other hand, the court finds that the cleric should be treated as an employee, then the court will need to identify the employer. In some, and perhaps most, circumstances, identification of the employer will be uncontroversial; a single entity will pay for and control the work of the wrongdoer.

In other circumstances, control over the employee might be dispersed among a number of bodies, with uncertainty or dispute about the precise limits of each body's authority. In such cases, all that we have said above, in the context of negligent employment cases, about constitutional sensitivity in processes of adjudication and sources of evidence, applies with equal

²⁷¹ See infra notes **-** and accompanying text.

²⁷² IRS Publication 15-A (p.5ff)

force.²⁷³

C. Criminal Culpability of Supervisors and Religious Institutions

As demonstrated in Part IIIB, religious institutions may be held accountable in civil court for their failure to supervise their clergy, when such failure leads to foreseeable harms to those who are vulnerable. Does anything change when prosecutors pursue supervisors and religious organizations for alleged criminal wrongdoing arising out of the same conduct? The first insights into this question may be gleaned from the results of the criminal investigations of various Roman Catholic Dioceses over the past several years. The most prominent and well-publicized among these occurred in Boston, where the Office of the Attorney General of Massachusetts conducted a lengthy investigation, empaneled a grand jury, and prepared a high-profile public report;²⁷⁴ in New Hampshire, where the state Attorney General similarly investigated and reported on the Diocese of Manchester;²⁷⁵ in Suffolk County, New York, where the County District Attorney empaneled a special grand jury, whose report on sexual abuse of children in the Diocese of Rockville Centre, NY, was eventually made public,²⁷⁶ with names of

²⁷³ If a court finds sufficient justification to hold that several different entities bore indicia of employer status, the court might hold each of the bodies jointly and severally liable. The parties would then be free to allocate among themselves their shares of the vicarious responsibility. Such an approach might even encourage the various entities to make *ex ante* agreements about how such liability should be apportioned for a given position.

²⁷⁴ Office of the Attorney General, Commonwealth of Massachusetts, *The Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston*, released July 23, 2003 (hereafter “Massachusetts Report”).

²⁷⁵ Office of the New Hampshire Attorney General, *Report on the Investigation of the Diocese of Manchester*, March 3, 2003 (hereafter “NH Report”).

²⁷⁶ Suffolk County Supreme Court, Special Grand Jury, May 6, 2002, Term ID, Grand Jury Report CPL sec. 190.85(1)(C), January 17, 2003 (hereafter “Suffolk County Report”). Of the

alleged perpetrators and victims omitted; and in Phoenix, Arizona, where the Maricopa County District Attorney in June, 2003 reached an agreement with the Bishop of the Diocese in lieu of prosecuting him for obstruction of justice. All four of these investigations were focused on allegations of supervisory wrongdoing by leaders in the church hierarchy, and contemplated the possible indictment of leaders as well as the religious institution of the Diocese or Archdiocese itself.

In addition to their focus on organizations belonging to the Roman Catholic Church, these proceedings displayed certain common themes. First, they all involved sexual crimes against minors rather than adults. As noted in Part III.A., above, sexual abuse of minors by clergy is always a crime of some sort, while comparable mistreatment of adults by clergy has rarely involved criminal wrongdoing. Second, all of the investigations involved religious entities against which there had been allegations of systematic wrongdoing going back over a period of many years. The New Hampshire Report for example, summed up its relevant conclusions by asserting that “. . .in multiple cases the Diocese knew that a particular priest was sexually assaulting minors, the Diocese took inadequate or no action to protect these children within the parish, and the priest subsequently committed additional acts of sexual abuse against children that the priest had contact with through the church.”²⁷⁷ In Massachusetts, the Attorney General’s report found “that widespread sexual abuse of children was due to an institutional acceptance of

three reports, this one is the most detailed and graphic with respect to the sexual misconduct of the offending clergy.

²⁷⁷ NH Report at 1.

abuse, and a massive and pervasive failure of leadership.”²⁷⁸ In light of this combination of criminal abuse of children and persistent institutional failure to take appropriate action with respect to accused priests, it should be no surprise that prosecutors pursued the possibility of supervisory or organizational culpability.

Third, none of these jurisdictions produced an indictment of a supervisor or an organization. As described below, all of the investigations produced evidence of wrongdoing that public authorities thought sufficient to warrant the imposition of criminal penalties. In Boston, MA and Suffolk County, NY, however, the authorities concluded that the available law was insufficient, either because (in the cases of many of the sexual abusers) the statutes of limitations had expired or (in the cases of supervisors and organizations) the relevant statutes were insufficiently tailored to the wrongs. In Manchester and Phoenix, church officers admitted criminal wrongdoing, and the investigations ended with agreements rather than trials.

1. *New Hampshire*

The State of New Hampshire came closest to an indictment of the Diocese itself. The Attorney General’s Report, which appeared in March, 2003, asserts that the State “was prepared to present indictments [to the local grand jury] . . . charging the Diocese of Manchester with multiple counts of endangering the welfare of a minor”²⁷⁹ Rather than face those

²⁷⁸ MA Report Finding No. 3, Executive Summary at 3.

²⁷⁹Id. The relevant statute, New Hampshire Revised Statutes Annotated sec. 639.3, provides that “A person is guilty of endangering the welfare of a child . . . if he knowingly endangers the welfare of a child under 18 years of age . . . by purposely violating a duty of care, protection, or support he owes to such a child.” Under state law, a corporation (including the “corporation sole” represented in the office of the Roman Catholic Bishop of Manchester, is included within the definition of “person” in the state’s criminal code. New Hampshire Revised Statutes Annotated, sec. 625:11, II.

indictments, the Diocese “acknowledged that the State had evidence likely to sustain a conviction against the Diocese for child endangerment.”²⁸⁰ The Diocese entered into an agreement with the State in which the Diocese promised to comply with strict requirements of reporting future allegations of similar wrongdoing, and to provide the state’s authorities with unlimited access to church documents, past and future, concerning the internal handling of such claims.²⁸¹

2. *Massachusetts*

The Massachusetts AG’s Report, released to the public in July, 2003, conceded that its investigation had found no evidence of recent or ongoing sexual abuse of children in the Archdiocese of Boston.²⁸² The bulk of the Report, however, consists of a scathing set of accusations aimed at the behavior of the leaders of the Archdiocese.²⁸³

Nevertheless, the Report includes as a major finding that “the investigation did not produce evidence sufficient to charge the Archdiocese or its Senior Managers with crimes under

²⁸⁰ *Id.* at 1.

²⁸¹ The key provisions of the agreement are summarized in the NH Report, *supra* note xx, at 2. NH is the only one of the four to explore First Amendment considerations, but these are limited to Smith and exemptions, and do not represent anything like a full and fair exploration of possible ecclesiastical immunities of the sort we are considering in this paper. *Id.* at 19-20.

²⁸² Massachusetts AG Report at 15 (Finding No.1).

²⁸³ *Id.* At 25 (Finding No. 3). The elaborate subfindings in this part of the Report include those pertaining to knowledge by Archdiocese officials of the extent of the clergy sexual abuse problem; placing children at risk by official inaction; failure to notify law enforcement authorities of allegations of abuse; failure to conduct adequate internal investigations; transferring abusive priests to other parishes; accepting transfers of abusive priests from other Dioceses; and failure to supervise priests with a history of sexual abuse of children. See MA Report, note xx *supra*, at Executive Summary, 3-5.

applicable state law.”²⁸⁴ The Report cursorily analyzes and dismisses the possibility that the Archdiocese or its leaders might have 1) committed acts of obstruction of justice; 2) been accessories before or after the fact of the felony of child sexual abuse; or 3) been parties to a criminal conspiracy. All of these crimes include requirements of intent to facilitate or benefit from the primary crime, and the Report asserts that these elements could not be proven with the evidence produced by the investigation.

The Report applauds, however, the recent enactment by the Massachusetts legislature of several laws designed to correct similar wrongdoing in the future. First, in the Spring of 2002, the legislature acted to extend to clergy, and other church employees who work regularly with children on the church’s behalf, the state’s law on mandatory reporting of child abuse.²⁸⁵ Second, a few months later, the legislature created the new crime of “recklessly endangering children.”

²⁸⁴ Id. at 21 (Finding No. 2).

²⁸⁵ Mass General Laws, Chap. 119, section 51A. This law, which had originally been enacted in 1973 and had covered health care professionals, teachers and others but not clergy, was amended to include any “priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, or accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis . . . “ The statute also provides, however, “[n]otwithstanding section 20A of chapter 233, a priest, rabbi, clergy member, ordained or licensed minister, leader of a church or religious body or accredited Christian Science practitioner shall report all cases of abuse under this section, but need not report information solely gained in a confession or similarly confidential communication in other religious faiths. Nothing in the general laws shall modify or limit the duty of a priest, rabbi, clergy member, ordained or licensed minister, leader of a church or religious body or accredited Christian Science practitioner to report a reasonable cause that a child is being injured as set forth in this section when the priest, rabbi, clergy member, ordained or licensed minister, leader of a church or religious body or accredited Christian Science practitioner is acting in some other capacity that would otherwise make him a reporter.” Id.

This enactment covers “whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act.”²⁸⁶ The Report laments that neither of these enactments can be applied to the Archdiocese’s institutional failures, all of which predated the new laws.

3. *Suffolk County (Long Island), NY*

As mentioned above, the report of the special grand jury empaneled to investigate the Diocese of Rockville Centre is the most graphic of all those produced by the official inquiries into possible criminal wrongdoing by a Catholic Diocese or Archdiocese. The Report includes nearly 100 pages of close detail concerning alleged instances of abuse of minors by Diocesan priests and the failures of other Diocesan agents, aware of the abuses, to take protective action.²⁸⁷ And the Report devotes another 65 pages to the institutional inadequacies of Diocesan policy and practice in responding to sexual abuse by clergy.²⁸⁸

Nevertheless, as in the Boston investigation, the grand jury did not issue indictments. It concluded that the acts of many priests had violated laws protecting children against sexual abuse, but that the relevant statutes of limitations had expired, making successful prosecutions impossible. And it concluded “that the conduct of certain Diocesan officials would have warranted criminal prosecution but for the fact that the existing statutes are inadequate.”²⁸⁹

²⁸⁶ Mass. General Laws, chap.265, S13L.

²⁸⁷ Suffolk County Report, note xx supra, at 3-95.

²⁸⁸ Id. at 106-171.

²⁸⁹ Id. at 174.

The Suffolk County Report concluded with a lengthy list of legislative recommendations. These included elimination or extension of statutes of limitations for various sexual crimes against minors;²⁹⁰ the extension of laws prohibiting sexual relations between professional caregivers and clients to include “anyone representing themselves as a member of the clergy who provides health care or mental health care services;”²⁹¹ the expansion of accessory liability to include post-crime conduct “that conceals or hinders discovery of the crime or evidence of the crime;”²⁹² the expansion of the statutory duty to report abuse of a child to include any child abused by any person,²⁹³ and the specific imposition of this duty upon members of the clergy or others serving a religious institution;²⁹⁴ and the enactment of a new criminal law on “Endangering the Welfare of a Child.”²⁹⁵

4. *Phoenix, AZ.*

The Maricopa County District Attorney’s Office conducted a lengthy grand jury investigation of sexual misconduct in the Phoenix diocese. The grand jury indicted six priests for abuse of children, and the grand jury heard evidence that Bishop Thomas O’Brien knew of the misconduct, failed to report it to public authorities, and transferred the accused priests to new

²⁹⁰ Id. at 175-76.

²⁹¹ Id. at 177. See supra notes **-* and accompanying text (discussing tort liability for clergy who hold themselves out as providers of mental health and other services).

²⁹² Id.

²⁹³ Id.

²⁹⁴ Id. at 178.

²⁹⁵ Id. at 177. Such an enactment would apparently be akin to the recently enacted Massachusetts law on reckless endangerment of a child.

parishes without informing anyone at those parishes of the accusations.²⁹⁶ The District Attorney seriously considered indicting Bishop O'Brien for obstructing justice as a result of the Bishop's conduct during the investigation.

Ultimately, Bishop O'Brien, facing the likelihood of prosecution, entered into an agreement covering the relationship between the Diocese and public authorities with respect to the handling of complaints of sexual misconduct against clergy under the Diocese's jurisdiction. Like the agreement in New Hampshire, the Phoenix agreement requires reporting to public authorities of all complaints of sexual misconduct by clergy within the Diocese. The Phoenix agreement goes further, however, by committing the Bishop to appoint a Moderator of the Curia, who is to serve as the Bishop's chief of staff, and a Youth Protection Advocate within the offices of the Diocese.²⁹⁷ The agreement specifies that the newly appointed Moderator, rather than the Bishop, will have ultimate responsibility "for dealing with issues that arise relating to revision, enforcement and application of the [newly agreed to] sexual misconduct policy."²⁹⁸ The Youth Protection Advocate is responsible for implementation of the policy within the diocese. In addition, the agreement specifies that the Advocate's decision to report allegations of child sexual abuse to public authorities are "to be made by the Youth Protection Advocate independently and not subject to the consent of Thomas J. O'Brien, or any other Diocesan

²⁹⁶ Charlie LeDuff, Phoenix Bishop Admits Moving Accused Priests, New York Times, June 3, 2003.

²⁹⁷ The agreement was printed in full on the website of the Arizona Republic, and is available in the database on clergy sexual abuse at www.poynter.org.

²⁹⁸ Id.

personnel.”²⁹⁹

The policies reflected in the enactments and agreements produced in these four jurisdictions are of course highly significant for the protection of children from future wrongs, and for the control of future misbehavior of this character by any and all institutions, religious or otherwise. Our particular focus in the remainder of this section, as in what has preceded it, lies in the question of religious distinctiveness. With respect to the child protection laws invoked or recommended by these Reports, are there any which raise such issues of distinctiveness, such that ecclesiastical immunities from them deserve consideration?

At the very outset of this Part III, we rejected any notion that ecclesiastical immunities might protect clergy who themselves engage in actionable sexual misconduct. Nothing in the constitutional principles we have been exploring suggests any limitation on the state’s authority to allege and prove unlawful sexual contact with a minor by a member of the clergy. With respect to supervisors and institutions, however, we think that the Establishment Clause may suggest limitations on some of the actions and recommendations that have emerged from these criminal investigations.

First, the imposition upon clergy and religious institutions of a duty to report suspected instances of child abuse may raise questions related to the priest-penitent privilege.³⁰⁰ If, as is

²⁹⁹ Id. Bishop O’Brien’s woes have mounted since the plea bargain. See Terry Greene Sterling and T.R. Reid, Bishop Convicted in Fatal Hit-and-Run, *Washington Post*, Feb. 18, 2004, p. A1 (reporting on conviction of Bishop O’Brien for “leaving the scene of an accident in which the car he was driving struck and killed a man”).

³⁰⁰ For a thorough appraisal of these issues, see Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. Rev. 1127 (2003).

frequently the case, the information about abuse does not come to the official of the religious entity from a communication covered by the privilege, this concern of course does not arise. In some cases, however, a clergyman may learn of sexual misconduct by another clergyman only as a result of an otherwise privileged communication. In such circumstances, may the state impose a mandatory duty to report?³⁰¹ Such an imposition would implicate, for some faiths at least, profound issues of religious freedom. In the Roman Catholic Church, for example, a priest is absolutely forbidden from breaking the seal of the confessional.³⁰² And it may well be both cruel and futile to impose a duty to report on clergy who will go to prison rather than violate the sacraments of their faith.

Whatever the policy merits of imposing duties to report on otherwise privileged communications with clergy, we think it is useful to frame and answer the constitutional question that such an imposition would raise. If the priest-penitent privilege is a creature of common law or statute only, it would follow that a state may create an exception to the privilege for cases of sexual abuse of a child. And, indeed, the case for such an exception would be quite powerful if every other helping profession were similarly regulated; if all secular professionals are obliged to report suspected abuse of a child, why should clergy be let off the hook? The demise of constitutionally required exemptions from religion-neutral general laws, dictated by *Employment*

³⁰¹ Id.

³⁰² Non-Catholics may indeed wonder why this obligation of clergy is more strenuous than the obligation to refrain from sexual misconduct itself, especially with respect to a child. But it is the business only of the religious community, not the state, to assign gravity and priority among the religious duties of members of the clergy.

Division v. Smith,³⁰³ suggests that clergy would have no basis for complaint under the Free Exercise Clause if they were among a wider group of professionals whose communication privileges were trimmed as a response to the problem of child abuse. Only if clergy were singled out among professionals for the loss of such a privilege would Free Exercise objections to that deprivation seem meritorious.³⁰⁴

There remains, however, a different constitutional perspective from which to analyze the question of a legislatively mandated exception to the priest-penitent privilege in cases of sexual abuse of a child. For reasons that derive from considerations of equal protection rather than free exercise of religion, we think that the scope of the priest-penitent privilege must be compared with the scope of attorney-client privilege.³⁰⁵ The law currently assures perpetrators of these (and other) crimes that they may safely confide in their lawyers concerning their misdeeds, and the Sixth Amendment's right to counsel may require such assurances. To permit the continuation of the attorney-client privilege for sex offenders while denying a comparable priest-penitent privilege for those same offenders is to create a secular advantage, favoring those who seek advice about legal consequences and options over those who seek spiritual advice concerning the same underlying behavior. Thus, so long as the state maintains the attorney-client privilege for sexual abusers of children, it may be under a constitutional obligation to do likewise with respect

³⁰³ *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

³⁰⁴ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

³⁰⁵ See generally Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994) (arguing for a constitutional paradigm shift from understanding religious liberty as a right of privilege to an understanding of religious liberty as – and only as – equal liberty of conscience and association).

to the priest-penitent privilege. By the same reasoning, victims of or witnesses to crimes of sexual abuse should also have the same right to seek spiritual or legal counsel, without fear of professional betrayal.³⁰⁶

The second concern raised by the application of criminal laws to religious institutions in cases of sexual misconduct relates to the basis for imposition of affirmative duties to protect children and others.³⁰⁷ The crime of reckless endangerment of a child – the charge which led the Diocese of Manchester, NH, to acknowledge culpability and enter into an agreement with the state Attorney General – includes as an element of the crime that the perpetrator be under a legal duty to protect the child. Those who are legal strangers to the child (even though they might be friends or neighbors) are under no such duty, and thus need not act to protect a child, even one in obvious and immediate danger.

The crime of reckless endangerment thus sounds in fiduciary duty, and raises the precise question that we considered in Part III.B.1, concerning the constitutional danger that religious organizations will be held to unique and distinctive legal responsibilities. In discussing the duty of care that the Diocese of Manchester owed to its child parishioners, the New Hampshire AG's report cited with approval the decision in *Martinelli v. Bridgeport Roman Catholic Diocesan*

³⁰⁶ This equality-based argument to preserve the priest-penitent privilege has the same force with respect to victims or witnesses only so long as the state recognizes attorney-client privilege for those in the same position. For victims and witnesses, however, the 6th Amendment right to counsel provides no floor under the attorney-client privilege, so states remain free to mandate reporting by lawyers and clergy when they learn of child abuse from those other than the perpetrator. No states ever do mandate such reporting by lawyers, so the equality-based argument for exempting from mandatory reporting the communications protected by the priest-penitent privilege seem quite strong.

³⁰⁷ See, e.g., John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. Rev. 1061 (2003)

*Corp.*³⁰⁸ We criticize *Martinelli* in Part III.B.1, above, for its unreflective acceptance of the risk that a civil jury might rely on the religious character of an organization in the imposition of fiduciary duties.³⁰⁹

In the criminal context as in the civil, we think it is a constitutional mistake to derive such a duty and all of its legal consequences from the religious character of the association. Religions may differ widely in their internal sense of obligation of the community to its members, and it is inappropriate for courts to impose a single, compulsory model of duty upon them all without more careful, individuated inquiry. The proper question to ask in this situation must be a religiously neutral one – has the organization held itself out as being responsible for the care and protection of children who are involved in its activities?

When the organization does so, duties of care to children follow. If, for example, a religious entity operates a youth ministry, children’s camp, or after-school sports program, the entity can fairly be said to assume a duty of care and protection towards the children enrolled; in these circumstances, parents and guardians are trusting their wards to the entity and its designated agents. If the entity, in such a program, assigns a person known to be a child abuser to a position of trust and responsibility toward children enrolled, it is fair to conclude that the entity has recklessly endangered a child toward whom it has a legal duty of protection. This result would be no different if the entity were a secular private school, camp, scouting program, or soccer league.

In contrast, a religious community should not be held to the same legal duty to protect all

³⁰⁸ 196 F.3d 409, 429-30 (2nd Cir. 1999), cited in New Hampshire Report at 5-6.

³⁰⁹ See also Chopko, B.C. L. Rev. at 1123-24.

children within the community from all persons who have some authority to speak for the group. If a clergyman offers, disconnected from his official role within the faith community, to babysit for a parishioner's child and then abuses that child, it is not reasonable, constitutionally or otherwise, to assign criminal liability for that abuse to the religious organization, even if its leaders knew of the clergyman's proclivities. To hold otherwise is effectively to put the faith community under a mandatory duty to defrock the clergyman for his prior abuse, a duty which the state may not impose.

Moreover, it would always seem unreasonable to impose such a duty in a comparable secular setting. If, for example, a university professor had been forcibly moved to emeritus status as a result of his sexually aggressive behavior with female students, we would not think that the university was under a legal duty to protect all women with whom the emeritus professor came into contact, even if the university had expressly permitted him the continued use of the emeritus title and he used the title to attract the attention of female students. If this is correct, the result should be no different if the organization from which the title is derived is religious rather than secular. As in the civil context, the Constitution precludes any concept of religiously distinctive liability or legal responsibility.

Our final concern relates to the remedial surrender of ecclesiastical authority under the threat of criminal prosecution. The Phoenix plea agreement raises serious constitutional question because it represents just such a surrender. The agreement requires the Bishop of the Diocese to cede final control to the Moderator of the Curia and the Youth Protection Advocate with respect to the internal handling of complaints of sexual abuse against clergy members. Issues of allocation of disciplinary authority over clergy are matters of church structure, and the state

should not be dictating or involving itself in such arrangements. If we are correct that constitutional limits on state competence are implicated by such arrangements, the state should be forbidden from entering into them, whether or not the religious entity is willing to make such a deal. However tempting such an arrangement may be, violations of the Establishment Clause may not be waived. Remedial arrangements, no less than substantive norms or procedural mechanisms, are subject to the constitutional prohibition on state interference in matters of internal church governance.³¹⁰

Conclusion

A proper understanding of the First Amendment leads to the conclusion that religious institutions have no sweeping immunities from any body of law, civil or criminal, dealing with sexual misconduct or any other kind. In most circumstances, such institutions and their agents should be treated identically with their secular counterparts. In some highly particularized legal contexts, however, the First Amendment may indeed limit the state's decision making bodies. The state may not impose unique legal responsibilities on religious bodies, nor expose such entities to an unreasonable risk of jury discrimination against them. Nor may the state adjudicate the answers to questions that are internal to a religious community, including the crucial question of who may serve as a spokesperson for the faith.

³¹⁰ We are not troubled by the provisions requiring reporting to public authorities of all internal complaints of sexual misconduct, or requirements of access to church records of the handling of such complaints. Several courts have recognized the constitutional significance of remedies in cases involving clergy or other leaders of religious organizations. See *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 949-50 (9th Cir. 1999) (contrasting constitutional implications of remedies of reinstatement and back pay); *McKelvey v. Pierce*, 173 N.J. 26, 45-49, 800 A.2d 840, 852-54 (2002) (same).

These First Amendment limitations leave the state with ample room to act when its concern is the protection of those who are especially vulnerable to sexual exploitation. It may impose responsibilities upon religious organizations, comparable to those borne by analogous secular entities, to take appropriate precautions in assigning leaders to roles involving the risk of such sexual exploitation; to report wrongdoing, unless knowledge of it arrives from a constitutionally protected relationship; and to refrain from taking advantage of those who have reposed special trust and confidence in the organization's leaders.

When the state does impose such responsibilities, however, it must rely exclusively on organizational characteristics that find analogies in the secular world. Just as some judges may be tempted to over-immunize religious institutions, others will be inclined to hold religious entities to unique duties of care and loyalty. The Constitution counsels resistance to such biases in either direction. That humans are forever over-expecting qualities of virtue in their religious leaders and institutions should lead us neither to confer upon them distinctive rights, nor to impose upon them distinctive legal responsibilities. In this recognition of the thoroughly undistinctive fallibility of all human institutions lies a measure of wisdom, constitutional and otherwise.