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Secrecy and Settlements: Is the New Jersey Charitable Immunity Act Justified in Light of the Clergy Sexual Abuse Crisis

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SECRECY AND SETTLEMENTS: IS THE NEW JERSEY CHARITABLE
IMMUNITY ACT JUSTIFIED IN LIGHT OF THE CLERGY
SEXUAL ABUSE CRISIS?

I. INTRODUCTION

A. *Overview of the Problem*

In tort law, there is one basic question: who will pay the damages?¹ This question is particularly relevant in the clergy sexual abuse crisis² currently impacting the Roman Catholic Church.³ In the majority of states,

1. See FRANK J. VANDALL ET AL., *TORTS: CASES AND PROBLEMS* 1 (2d ed. 2003) (explaining that question of who will be responsible for paying damages underlies all tort actions); Frank L. Maraist, *Of Envelopes and Legends: Reflections on Tort Law*, 61 LA. L. REV. 153, 153 (2002) (noting that tort law requires resolution of only one issue: whether it is preferable to impose cost upon actor or victim).

2. The phrase "clergy sexual abuse crisis" refers to the numerous allegations of clergy sexual abuse of minors, which victims began reporting in the early 1980s. See Rev. John J. Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977, 977 (2003) (using phrase to refer to sexual abuse of minors by priests). Scholars have also used the term "scandal" to refer to the revelations about clergy sexual abuse. See, e.g., John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. REV. 1061, 1061 (2003) (referring to allegations of clergy sexual abuse as "scandal"); Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 125 (2003) (same); Susan Vivian Mangold, *Reforming Child Protection in Response to the Catholic Church Child Sexual Abuse Scandal*, 14 U. FLA. J.L. & PUB. POL'Y 155, 155 (2003) (same); Rev. Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 373 (2004) (same); Arthur Gross Schaefer & Dan Van Bogaert, *The Changing Legal Landscape for Clergy*, 42 CATH. LAW. 117, 117 (2002) (same); Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 LAW & PSYCHOL. REV. 409, 412 (1994) (same); Catharine Pierce Wells, *Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy*, 44 B.C. L. REV. 1201, 1227 (2003) (same). Clergy sexual abuse has been the subject of extensive media coverage. See Coughlin, *supra* at 977 (noting that revelations of clergy sexual abuse "have drawn intense media scrutiny"); Smith, *supra*, at 409 (acknowledging that clergy sexual abuse has been "hot topic" in media); Kristina Henderson, *Clergy Scandal Biggest Story of '02; Religion Writers Vote It 4 of Top 10*, WASH. TIMES, Dec. 19, 2002, at A02 ("[C]lergy sexual abuse scandal . . . was voted the top religion story of 2002 by members of the Religion Newswriters Association."). See generally JASON BERRY, *LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN* (2002) (discussing prevalence of clergy sexual abuse in Catholic church); INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* (2002) [hereinafter *BETRAYAL*] (reporting revelations about clergy sexual abuse scandal, primarily events occurring in Boston); Laurie Goodstein, *Decades of Damage; Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, § 1, at 1 (providing overview of clergy sexual abuse scandal); Robin Washington, *Panel: Church Must Change for Crisis to End*, BOSTON HERALD, Jan. 26, 2004, at 18 (reporting that clergy sexual abuse crisis continues).

3. See Wells, *supra* note 2, at 1202 (describing concerns raised as result of sexual abuse in church); see also Angela C. Carmella, *The Protection of Children and*

victims can seek damages from both the abusive clergy member and the church.⁴ Access to the church's funds is important because priests typically have limited assets.⁵ In New Jersey, however, victims of clergy sexual

Young People: Catholic and Constitutional Visions of Responsible Freedom, 44 B.C. L. REV. 1031, 1041 (2003) (“[F]or cases of clergy sexual abuse of minors, a jurisdiction’s approach is critical to whether a victim can sue for damages.”). Disclosure of clergy sexual abuse has led to public demands for compensation. See Wells, *supra* note 2, at 1202. “Even the most restrained voices have demanded that the victims be compensated and the offenders be punished.” *Id.* “Large civil judgments” are one component of the remedy sought. *Id.* For example, in a current civil action against Cardinal Bernard Law and Bishop Howard Hubbard, one plaintiff is seeking \$5 million. See Michele Morgan Bolton, *Diocese Asks for Time to Appeal Trial Location; Church Leaders Want Sex Abuse Lawsuit to Be Heard in Albany*, TIMES UNION (Albany, N.Y.), Oct. 14, 2004, at B8 (describing monetary damages sought in clergy sexual abuse action). The plaintiff is alleging that priest Dozia Wilson sexually abused him in the early 1980s. See *id.* (reporting character of allegations). He is further alleging that both Law and Hubbard knew about Wilson’s pedophilic behavior and, despite this knowledge, protected the priest by transferring him among different parishes. See *id.* (describing cause of action against Law and Hubbard). The \$5 million judgment plaintiff is seeking is not anomalous when compared to other civil judgments awarded nationwide. See, e.g., Maggie Mulvihill, *Church Crisis; Insurers, Church Usually Settle Sex Abuse Cases*, BOSTON HERALD, Feb. 10, 2002, at 6 (noting that Texas jury awarded eleven victims of clergy sexual abuse \$119.6 million); David O’Reilly, *Camden Diocese Agrees to Settle Sex-Abuse Suit*, PHILA. INQUIRER, Mar. 14, 2003, at A01 (remarking that twenty-three plaintiffs in clergy sexual abuse action sought \$50 million). It is important to keep in mind, however, that the church often settles these civil actions for amounts less than that sought by plaintiffs. See Mulvihill, *supra* at 6 (“[C]hurch officials nearly always settle to avoid embarrassing and public courtroom battles.”). For example, in Texas, after a jury awarded \$119.6 million to eleven victims of clergy sexual abuse, the Catholic Archdiocese for San Antonio negotiated a settlement of \$35.9 million. See *id.* (explaining that church did not actually pay amount awarded by jury).

4. See Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 957 (2003) (“In a typical clergy sexual misconduct lawsuit, the plaintiff sues the pastor who committed the abuse, the congregation that employed him, and the religious organization with which the pastor and congregation were affiliated.”); see also RESTATEMENT (SECOND) OF TORTS § 895E cmt. d (1979) [hereinafter RESTATEMENT TORTS] (stating that majority of jurisdictions abolished charitable immunity); Mark Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1089–90 (2003) (warning that “[t]he demise of charitable immunity generally, and its limitation in virtually every jurisdiction means that [religious organizations] must pay attention to their legal relationships and conduct”); James T. O’Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 60 (1994) (explaining that judicial abandonment of charitable immunity in tort actions against religious entities began in 1950s and is now majority position).

5. See Schiltz, *supra* note 4, at 957 (noting that most “pastors are judgment-proof”); see also U.S. DEP’T OF LABOR, *Occupational Outlook Handbook: Roman Catholic Priests* [hereinafter *Occupational Handbook*], at <http://stats.bls.gov/oco/ocos063.htm> (last visited Dec. 1, 2004) (providing average salary for Roman Catholic priests). Priests’ salaries vary depending on the particular diocese. See *id.* (explaining lack of uniformity in priests’ salaries). A 2002 survey of the National Federation of Priests’ Councils revealed that average salaries range between \$15,291 and \$18,478 per year. See *id.* (providing average salary figures for Roman Catholic priests). Benefits such as room and board are not included in these figures. See *id.*

abuse cannot reach into the church coffers.⁶ The New Jersey Charitable Immunity Act shields the church from tort liability in order to ensure its assets are not depleted.⁷

(noting types of compensation not included in salary figures). The lack of priests' assets shifts plaintiffs' focus from the clergy member to the church. See O'Reilly & Strasser, *supra* note 4, at 38 (noting that plaintiffs sue churches in clergy misconduct cases because priests are "often bankrupt or essentially penniless" and churches have "both insurance and assets"); see also Schiltz, *supra* note 4, at 957–58 (explaining how churches become parties in clergy sexual abuse litigation).

6. See Chopko, *supra* note 4, at 1090 n.1 ("In New Jersey, which preserves charitable immunity, a beneficiary of the charity may not maintain an action in tort for the negligence of the entity and its personnel."); see, e.g., *Rivera v. Alonso*, No. 88-5529, 1989 U.S. Dist. LEXIS 12378, at *2 (D.N.J. Oct. 18, 1989) (holding that Charitable Immunity Act precludes action against Diocese of Paterson arising out of clergy sexual abuse); *Schultz v. Roman Catholic Archdiocese*, 472 A.2d 531, 536 (N.J. 1984) (holding that Charitable Immunity Act precludes archdiocese liability in negligent hiring action stemming from clergy sexual abuse).

7. See N.J. STAT. ANN. § 2A:53A-7 (West 2004) (establishing charitable immunity for "nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes"). The Charitable Immunity Act states:

a. No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association

.....

c. Nothing in this section shall be deemed to grant immunity to: (1) any trustee, director, officer, employee, agent, servant or volunteer causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature; (2) any trustee, director, officer, employee, agent, servant or volunteer causing damage as the result of the negligent operation of a motor vehicle; or (3) an independent contractor of a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes.

Id.; see also *Schultz*, 472 A.2d at 537 (discussing legislative intent of Act). Subsection (c) of the Charitable Immunity Act applies only to individuals—the individuals named in this section are not immune from liability if they "[cause] damage by a willful, wanton, or grossly negligent act . . . including sexual assault." See N.J. STAT. ANN. § 2A:53A-7(c) (West 2004) (creating exception to immunity provided to individuals under Charitable Immunity Act). Notably, if an individual affiliated with a charitable organization does commit a grossly negligent act, the charitable organization retains its immunity. See John Chadwick, *N.J. Law Still Blocks Suits on Sex Abuse by Clergy; Church Fights Bills to Limit Immunity*, THE REC. (Bergen County, N.J.), May 2, 2003, at A01 (noting that, even where employees of charitable organizations are grossly negligent, "the organization as a whole cannot be held liable."). The distinction is important because, in the Roman Catholic Church, only the church itself has the resources needed to recompense victims of clergy sexual abuse—priests typically have meager assets insufficient to pay large tort judgments.

Clergy sexual abuse of minors has long plagued the Catholic Church.⁸ During the early 1980s, scandal erupted, bringing the problem to the forefront of the American conscience.⁹ Specifically in 1983, victims of Roman Catholic priest Gilbert Gauthé filed numerous lawsuits alleging the priest had sexually abused them as minors.¹⁰ This litigation was the

For a discussion of the limitations of priests' assets and the importance of access to church funds, see *supra* note 5 and accompanying text.

8. See Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 *FORDHAM URB. L.J.* 549, 574 (2004) (explaining that clergy sexual abuse has impacted Catholic Church for duration of its "two-thousand year history"); see also Coughlin, *supra* note 2, at 977 (stating that clergy sexual abuse is "not novel in the history of the Roman Catholic Church"); Goodstein, *supra* note 2, at 1 (remarking that *New York Times* survey revealed clergy sexual abuse occurring in 1930s).

9. See Doyle & Rubino, *supra* note 8, at 554–55 ("Cases involving clergy sexual abuse came to the forefront of public knowledge starting in 1984 . . ."); see also Anthony DePalma, *Church Scandal Resurrects Old Hurt in Louisiana Bayou*, *N.Y. TIMES*, Mar. 19, 2003, at A1 (noting that national attention received by abusive priest in Louisiana "opened the way for" clergy sexual abuse civil suits nationwide). The National Council of Catholic Bishops also made Pope John Paul II aware of the problem of clergy sexual abuse in America in the early 1980s. See Jo Renee Formicola, *The Vatican, the American Bishops, and the Church-State Ramifications of Clerical Sexual Abuse*, *J. CHURCH & ST.*, June 22, 2004, at 479 (discussing pope's awareness of clergy sexual abuse problem in America).

10. See Schiltz, *supra* note 4, at 952–53 (describing litigation resulting from Gauthé's abuse). Revelations about Gilbert Gauthé's pedophilic behavior began "after one of his loyal flock of altar boys was hospitalized with rectal bleeding." DePalma, *supra* note 9, at A1 (recounting discovery of Gauthé's abuse). Gauthé ultimately admitted to abusing thirty-seven boys, but did not apologize for his actions. See *id.* (discussing Gauthé's admission). The church paid thirty-five of the victims settlements, which amounted to "hundreds of thousands of dollars each." *Id.*; see also Fred Bayles, *Abuse Victims Say It's Not About the Money*, *USA TODAY*, Sept. 10, 2003, at 8D (listing Gauthé settlement among one of the "larger known settlements"). Most settlements included confidentiality agreements. See DePalma, *supra* note 9, at A1 (noting reluctance to discuss Gauthé settlements). Two civil cases did go to trial and juries awarded damages in excess of \$1 million. See *id.* (discussing civil actions against Gauthé). Information is only available regarding one of the civil actions, brought by Glenn and Faye Gastal on behalf of their minor son, because the court sealed most documents filed in lawsuits against Gauthé. See Kathy Sawyer, *Priest's Child-Molestation Case Traumatizes Catholic Community*, *WASH. POST*, June 9, 1985, at A6 ("[P]arents and church officials kept the matter quiet to protect the children."). The Gastals brought a \$12 million civil action against Gauthé and the Roman Catholic Church. See *Jury Awards \$1 Million to Boy Among 36 Molested by Priest*, *CHI. TRIBUNE*, Feb. 8, 1986, at 3C (describing Gastals' civil action). Testimony during the trial revealed that Gauthé began abusing the victim when he was seven years old. See *id.* (same). The jury awarded the victim \$1 million. See *id.* (same). In addition to civil actions, Gauthé also faced criminal prosecution. See Doyle & Rubino, *supra* note 8, at 549 (discussing criminal proceedings against Gauthé). He pled guilty to thirty-nine counts of sexual battery and the court sentenced him to twenty years in prison. See *id.* (same); see also DePalma, *supra* note 9, at A1 (discussing Gauthé's plea bargain and subsequent release from prison); Goodstein, *supra* note 2, at 1 (recounting Gauthé's punishment and its costs on society).

“spark” that ignited the church sexual abuse scandal.¹¹ Following the revelations about Gauthé, there was a marked rise in clergy sexual misconduct litigation.¹²

In 2002, the church scandal heated up with a renewed fervor.¹³ In January of that year, the *Boston Globe* uncovered evidence that Roman Catholic priest John Geoghan had abused over one hundred and thirty boys in the past thirty years.¹⁴ The priest had bounced from parish to

11. See Schiltz, *supra* note 4, at 952 (characterizing Gauthé litigation as “spark” that ignited victims’ anger over abuse); see also Doyle & Rubino, *supra* note 8, at 554 (“There is little doubt that the publicity surrounding the [Gauthé] case was a major catalyst for the legal and cultural explosions that have rocked the Catholic Church.”); Timothy Liam Epstein, Note, *Surviving Exemption: Should the Church Exemption to ERISA Still Be in Effect?*, 11 ELDER L.J. 395, 414 (2003) (noting that Gauthé litigation “broke open the modern scandal”); Nicholas Wapshott, *Devious Priest at Heart of National Scandal*, TIMES (London), Aug. 25, 2003, at 13 (characterizing Gauthé’s abuse as event propelling clergy sexual abuse to “national issue”).

12. See Schiltz, *supra* note 4, at 953 (describing effects of Gauthé litigation).

13. See Pam Belluck, *Scandals in the Church: The Overview; Law, Citing Abuse Scandal, Quits as Boston Archdiocese and Asks for Forgiveness*, N.Y. TIMES, Dec. 14, 2002, at A6 (recounting most recent eruption in clergy abuse scandal); Cathy Lynn Grossman, *A Guide to Issues, Players at U.S. Bishop’s Summit*, USA TODAY, June 10, 2002, at 10D (explaining that clergy sexual abuse reached crisis level after events in January 2002 “reignited a smoldering problem”); see also BETRAYAL, *supra* note 2 (describing *Boston Globe*’s revelations about Father John Geoghan and Cardinal Bernard Law, which unleashed wave of media attention on clergy sexual abuse); O’Brien, *supra* note 2, at 373 (noting that “current scandal” began in January 2002 when *Boston Globe* reported Geoghan’s sexual abuse of minors). Although it was clergy sexual abuse cases involving Cardinal Law in Boston that reignited the scandal, the Boston revelations “started a chain reaction” nationwide. See Martin Kasendorf et al., *Boston Church Scandal Starts Chain Reaction*, USA TODAY, Dec. 19, 2002, at 13A (describing impact of Boston revelations). In 2002, bishops across the country began admitting to wrongdoing and hundreds of priests resigned or were dismissed. See *id.* (same). The 2002 scandal was distinguishable in some ways from the one in the early 1980s. See O’Brien, *supra* note 2, at 373 (pointing out difference in 2002 reports of clergy sexual abuse from reports in 1980s). For example, there was a large amount of media coverage concentrated in a short amount of time. See *id.* (remarking that *Boston Globe* published many articles in a short time period about clergy sexual abuse); cf. Matthew Felling, *Sex, Lies, and Vaticangate*, WORLD AND I, Dec. 1, 2002, at 60 (describing extensive media coverage and offering explanation for it). Additionally, there was a growing perception that “some underlying systemic cause” had contributed to the scandal. See O’Brien, *supra* note 2, at 373 (identifying additional reason 2002 scandal differed from clergy sexual abuse scandal in 1980s); see also Eileen McNamara, *Church Ills Run Deep*, BOSTON GLOBE, Jan. 27, 2002, at B1 (noting that church must address “systemic ills” underlying abuse scandal). Finally, victims bringing actions during the 2002 scandal did so as adults rather than as children, while victims in the 1984 Gauthé scandal brought contemporaneous actions following the revelation that an alter boy had been sexually abused. See DePalma, *supra* note 9, at A1 (describing difference between 2002 and 1980s clergy sexual abuse scandals). “[U]nlike the adults in Boston who have . . . brought complaints about events decades old, [victims of Gilbert Gauthé] could confront their abuser and see him punished when they were still boys.” *Id.*

14. See Belluck, *supra* note 13, at A6 (describing revelations in abuse scandal resulting from *Boston Globe*’s investigation). See generally Michael Rezendes, *Church Allowed Abuse By Priest For Years Aware of Geoghan Record, Archdiocese Still Shuttled Him*

parish, victimizing mainly prepubescent males.¹⁵ Despite Cardinal Bernard Law's knowledge of Geoghan's transgressions, the cardinal repeatedly allowed the priest to return to church parishes.¹⁶ Following the *Boston Globe's* revelations, hundreds of people across the United States raised allegations of clergy sexual abuse.¹⁷ The flood of new allegations raised questions about the role of the church in the scandal—specifically, questions arose as to whether there was an “underlying systemic cause.”¹⁸

The New Jersey legislature chose to revive charitable immunity in 1958, more than twenty years before the media exposed the clergy sexual abuse scandal in the 1980s.¹⁹ The revelations about clergy sexual abuse did not alter New Jersey courts' willingness to apply charitable immunity—

from Parish to Parish, BOSTON GLOBE, Jan. 6, 2002, at A1 (discussing Geoghan's abuse and Cardinal Law's knowledge of abuse). The *Boston Globe* uncovered the evidence about Geoghan after reviewing “public files” of the pending civil lawsuits against the priest. See *id.* (describing unearthing of evidence as unprecedented, yet “remarkably skeletal” due to sealed documents). The newspaper was also instrumental in effectuating the release of previously sealed documents from “lawsuits about the church's supervision of Geoghan.” See *id.* (commenting on *Boston Globe's* successful motion to have documents released to public).

15. See Rezendes, *supra* note 14, at A1 (discussing Geoghan's actions and victims).

16. See *id.* (describing Geoghan's reassignments to multiple parishes). In 1984, Cardinal Law was aware of Geoghan's previous sexual abuse. See *id.* (explaining Cardinal Law's knowledge during Geoghan's transfers among parishes). “[C]omplaints that Geoghan had abused children at [St. Brendan's in Dorchester, Massachusetts] prompted Law to remove him.” *Id.* Notwithstanding this knowledge, Cardinal Law transferred Geoghan to St. Julia's parish in Weston, Massachusetts, where the priest assumed responsibility for several youth groups. See *id.* (same). Allegations of sexual abuse in St. Julia's parish surfaced. See *id.* (noting Geoghan's pattern of abuse continued). Geoghan received treatment as a result of the new allegations. See *id.* (discussing response to allegations of Geoghan's abuse). Upon completion of treatment, however, the Boston Archdiocese permitted Geoghan to return to St. Julia's. See *id.* (same). There, Geoghan resumed his sexual abuse of minors. See *id.* (noting pattern of abuse continued). “The civil and criminal allegations Geoghan faces . . . suggest that he allegedly abused at least 30 more boys after Law sent him to [St. Julia's] in 1984—both before and after the half year's [treatment] in 1989.” *Id.*

17. See Fred Bayles, *Abuse Victims Flock to Lawyers*, USA TODAY, July 31, 2002, at 1D (citing Associated Press survey that “found 300 [clergy sexual abuse] cases had been filed around the country in the first five months of 2002”); Kevin Clarke, *Whiteash or Renewal?*, U.S. CATHOLIC, June 1, 2003, at 12 (“[H]undreds of stories [following the *Boston Globe's* revelations] report new allegations of cover-ups across the country.”); Sam Dillon & Leslie Wayne, *Scandals in the Church: The Money*, N.Y. TIMES, June 13, 2002, at A1 (reporting results of Associated Press survey).

18. See O'Brien, *supra* note 2, at 373 (“[T]his particular scandal was dominated by the ‘growing and widespread persuasion that the scandal had occurred not simply because of the moral weakness that touches us all . . . but because there is some underlying systemic cause.’”); see also McNamara, *supra* note 13, at B1 (expressing opinion that “systemic ills” contributed to scandal).

19. See Alicia Bottari, *The Charitable Immunity Act*, 5 SETON HALL LEGIS. J. 61, 66 (1980) (noting that New Jersey legislature revived charitable immunity on July 22, 1958). For a discussion of the legislative history of the New Jersey Charitable Immunity Act, see *infra* notes 71–77, 123–34 and accompanying text.

the New Jersey Supreme Court applied the Charitable Immunity Act in *Schultz v. Roman Catholic Archdiocese*.²⁰ In *Schultz*, the court extended immunity to the church in negligent hiring actions arising out of the sexual abuse of minors.²¹ Because a bevy of new allegations nationwide recently renewed questions about church liability, the time has come to reevaluate the statute and its place in an environment where clergy sexual abuse of minors is an unfortunate reality.²²

B. Overview of the Note

This Note discusses the New Jersey Charitable Immunity Act in light of the Catholic clergy sexual abuse scandal. Part II tracks the development of the New Jersey Charitable Immunity Act.²³ Part III explains the justifications for charitable immunity and explores the applicable counterarguments.²⁴ Part IV considers whether the Charitable Immunity Act is both appropriate and effective in light of the clergy sexual abuse scandal in the Roman Catholic Church.²⁵ Specifically, this Note considers whether the church itself contributed to the scandal and whether the economic justification for the Act can be reconciled with the financial reality of settlements entered into by the church.²⁶ Finally, Part V concludes that New Jersey should amend the Charitable Immunity Act to reduce the impedi-

20. See 472 A.2d 531, 535 (N.J. 1984) (discussing statute's applicability).

21. See *id.* at 536 (stating holding). In *Schultz*, the New Jersey Supreme Court held that a victim of clergy sexual abuse could not hold the archdiocese employing the abuser liable under the theory of negligent hiring. See *id.* (stating that cause of action was negligence in hiring). The archdiocese was a charitable organization under the meaning of the Act. See *id.* (discussing characteristics of charitable organizations). For a discussion of *Schultz*, see *infra* notes 78–91 and accompanying text.

22. See generally Terrence Dopp, *NJ Senate Panel to Further Examine Allowing Suits Against the Church* (Jan. 27, 2004), at www.snapnetwork.org/legislation/nj_senate_panel_charitable.htm ("Attacking what some call an impediment to lawsuits by victims of clergy sex abuse, the state Senate is considering changes to a 1958 law protecting non-profit organizations from litigation."); NEW JERSEY SENATE DEMOCRATS, *Vitale Statement on Charitable Immunity Reform* (Jan. 26, 2004) [hereinafter *Vitale Statement*], at <http://www.njsendems.com/Releases/04/January/Vitale%20Statement%20on%20Charitable%20Immunity%20Reform,%201-26-04.htm> (explaining that reform is necessary in order to protect minors in New Jersey). For a discussion of past and current proposed amendments to the New Jersey Charitable Immunity Act, see *infra* note 74 and accompanying text.

23. For a discussion of the development of charitable immunity in New Jersey, from English common law to present, see *infra* notes 30–91 and accompanying text.

24. For a discussion of justifications for the charitable immunity doctrine and, more specifically, the New Jersey Charitable Immunity Act, see *infra* notes 92–134 and accompanying text.

25. For a discussion of the New Jersey Charitable Immunity Act in the context of the clergy sexual abuse scandal, see *infra* notes 135–222 and accompanying text.

26. For a discussion of the church's role in the clergy abuse crisis and its payment of large settlements to abuse victims, see *infra* notes 149–222 and accompanying text.

ments victims of clergy sexual abuse encounter in negligent hiring and supervision actions against the church.²⁷

In the interest of conciseness, this Note will focus on the Roman Catholic Church because it is the “largest institutional church in America.”²⁸ It is important to note that clergy sexual abuse of minors is not unique to any particular denomination.²⁹

II. NEW JERSEY CHARITABLE IMMUNITY ACT

A. Historical Development of New Jersey Charitable Immunity Act

1. Adoption of Common Law Doctrine

In 1925, New Jersey adopted the common law doctrine of charitable immunity, derived from English common law, in *D’Amato v. Orange Memorial Hospital*.³⁰ In *D’Amato*, the New Jersey Supreme Court considered whether a charitable hospital should be liable for its nurses’ negligence.³¹ The court looked to decisions from three states for guidance.³² All ruled

27. For a discussion of conclusions about the applicability and effectiveness of the New Jersey Charitable Immunity Act, see *infra* notes 223–43 and accompanying text.

28. See O’Brien, *supra* note 2, at 365 (discussing size of Roman Catholic Church in United States). The United States Conference of Catholic Bishops reports that, in 2003, there were 63.4 million Catholics in the United States, which represented 23% of the country’s population. See U.S. CONFERENCE OF CATHOLIC BISHOPS, *Catholic Information Project* (Dec. 2003), at <http://www.usccb.org/comm/cip.htm> (providing statistics about number of Catholics, parishes and priests nationwide).

29. See O’Reilly & Strasser, *supra* note 4, at 34 (explaining that clergy sexual abuse is not unique to any one denomination). Multiple religious denominations have faced allegations of clergy sexual abuse. See *id.* (explaining that Roman Catholic Church is not only institutional church that has experienced problem of clergy sexual abuse).

Since 1991, at least four rabbis of major congregations have lost their positions due to claims of sexual relations with congregation members. Buddhist teachers have been accused of exploiting women at Zen communities in the United States. The United Methodist Church reported in a 1990 survey that nearly 23 percent of the laywomen had been sexually harassed, 17 percent by their own pastor and 9 percent by another minister. In a survey of evangelical ministers, 23 percent admitted to engaging in sexually inappropriate conduct

Id. In addition to affecting multiple denominations, clergy sexual abuse has impacted countries outside the United States. See Doyle & Rubino, *supra* note 8, at 551 (describing clergy sexual abuse in other countries).

30. 127 A. 340, 341 (N.J. 1925) (holding that charitable hospital is immune from tort liability); see also Bottari, *supra* note 19, at 61–62 (tracing historical development of charitable immunity).

31. See *D’Amato*, 127 A. at 340 (stating facts and issues of case). Plaintiff suffered injuries during her hospital stay when she fell during a transfer from a wheelchair to a hospital bed. See *id.* (describing injury).

32. See *id.* at 341 (examining case law from New York, Pennsylvania and Massachusetts). Specifically, the court relied on *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914) (holding that hospital is not liable for negligence of employees), *Gable v. Sisters of St. Francis*, 75 A. 1087, 1088 (Pa. 1910) (holding

in favor of charitable immunity.³³ Without elaboration beyond a summary of the three cases, the court concluded “public policy requires that a charitable institution maintaining a hospital be held not liable for injuries resulting to patients through negligence or carelessness of its physicians and nurses.”³⁴ The court did not, however, identify the specific public policy objective it believed charitable immunity advances.³⁵ Regardless, the court’s decision effectively introduced immunity to charitable organizations within the state.³⁶

that public charity is not liable for its servants’ torts) and *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 436 (1876) (holding that hospital is not liable for negligence of employees). *See id.* (highlighting existing case law). In *Schloendorff*, plaintiff was injured during an unauthorized operation. *See Schloendorff*, 105 N.E. at 93 (stating facts). As a result of the surgery, plaintiff developed gangrene and “some of her fingers had to be amputated.” *See id.* (same). The court applied the doctrine of charitable immunity and held that the hospital was not liable. *See id.* at 95 (discussing holding). Plaintiff in *Gable* was also staying in a hospital. *See Gable*, 75 A. at 1088 (stating facts). In order to warm plaintiff’s hospital bed, nurses placed bottles of hot water in it. *See id.* (same). After one nurse rearranged the bottles around plaintiff’s body, hot water leaked and scalded plaintiff, who was “unconscious and helpless in the bed.” *See id.* (same). The court applied the doctrine of charitable immunity and did not hold the hospital liable. *See id.* (discussing holding and rationale). Plaintiff in *McDonald* fractured his leg. *See McDonald*, 120 Mass. at 434 (stating facts). He alleged that agents of defendant hospital “negligently and unskillfully” treated him, thereby causing permanent injuries. *See id.* (same). The court applied charitable immunity and held that the hospital was not liable for plaintiff’s injuries. *See id.* at 436 (discussing holding and rationale).

33. *See D’Amato*, 127 A. at 341 (summarizing holdings in *Schloendorff*, *Gable* and *McDonald*); *see also McDonald*, 120 Mass. at 436 (stating holding); *Schloendorff*, 105 N.E. at 93 (same); *Gable*, 75 A. at 1088 (same). The *Schloendorff* court summed up its reasoning by explaining, “[a] hospital opens its doors without discrimination to all who seek its aid In this beneficent work, it does not subject itself to liability for damages though the ministers of healing whom it has selected have proved unfaithful to their trust.” *Schloendorff*, 105 N.E. at 95.

34. *D’Amato*, 127 A. at 341 (explaining court’s rationale).

35. *See Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 280 (N.J. 1958) (remarking that “the Chancellor did not document his expression of public policy, nor did he discuss the underlying reasons for the court’s conclusion that it should then declare the immunity”).

36. *See Schultz v. Roman Catholic Archdiocese*, 472 A.2d 531, 540 (N.J. 1984) (identifying *D’Amato* as “first authoritative pronouncement of the charitable immunity doctrine in [New Jersey]”); *see also Bottari*, *supra* note 19, at 64 (“Judicial affirmation for this common law doctrine has been frequent.”); *see, e.g., Casper v. Cooper Hosp.*, 98 A.2d 605, 606 (N.J. Super. Ct. App. Div. 1953) (applying doctrine of charitable immunity in reliance on *D’Amato*); *Woods v. Overlook Hosp. Ass’n*, 69 A.2d 742, 749–50 (N.J. Super. Ct. App. Div. 1949) (applying *D’Amato* despite recognition that charitable immunity doctrine is widely criticized); *Boeckel v. Orange Mem’l Hosp.*, 158 A. 832, 833 (N.J. Sup. Ct. 1932) (applying doctrine of charitable immunity in reliance on *D’Amato*). *But cf. Kolb v. Monmouth Mem’l Hosp.*, 182 A. 822, 823 (N.J. 1936) (declining to afford hospital charitable immunity on basis that plaintiff was not beneficiary of hospital’s charitable works).

2. Abolishment of Common Law Doctrine

Following a judicial decision that recognized a qualification on charitable immunity,³⁷ a trilogy of cases decided in 1958 abolished the common law doctrine in New Jersey.³⁸ The court rejected immunity in a negligence action against a nonprofit charitable hospital facility in *Collopy v. Newark Eye and Ear Infirmary*.³⁹ The court extended its holding in *Collopy* to all charitable institutions, regardless of the particular charitable aim, in *Dalton v. St. Luke's Catholic Church*.⁴⁰ In doing so, the court silenced arguments that the *Collopy* holding "should be limited so as to exclude churches and similar charitable immunities."⁴¹ Finally, the court reaffirmed its position by holding that charitable immunity was unavailable to the Y.M.C.A. in *Benton v. Y.M.C.A.*⁴²

In *Collopy*, the court rationalized its holding by exploring several problems with charitable immunity.⁴³ First, the court emphasized that the English decision that established the doctrine of charitable immunity was

37. See *Jewell v. St. Peter's Parish*, 76 A.2d 917, 918–19 (Hudson County Ct. 1950) (holding that charitable immunity is unavailable where activity is unconnected to church's primary function). Plaintiff in *Jewell* attended a festival on defendant church's property. See *id.* at 918 (stating facts). While there, plaintiff fell on a stairway. See *id.* (same). She alleged that the defendant's negligence caused "the faulty condition of the stairway." See *id.* (stating plaintiff's cause of action). Defendant church argued that it was immune from tort liability arising out of its servants' negligence. See *id.* (noting defendant's reliance on charitable immunity). The court rejected defendant's argument because "what attracted plaintiff to defendant's building and there engaged her [was] essentially unrelated to defendant's institutional life and work." See *id.* at 919 (discussing qualification on charitable immunity). That is, the activity was strictly secular rather than ecclesiastical. See *id.* (explaining reason for qualification).

38. See *Benton v. Y.M.C.A.*, 141 A.2d 298, 299 (N.J. 1958) (refusing to apply doctrine of charitable immunity); *Collopy*, 141 A.2d at 276 (same); *Dalton v. St. Luke's Catholic Church*, 141 A.2d 273, 274 (N.J. 1958) (same).

39. See *Collopy*, 141 A.2d at 287 (stating holding). In *Collopy*, the plaintiff suffered injuries after falling out of a hospital bed. See *id.* at 277 (stating facts). The bed did not have "suitable guardrailings." See *id.* (same). After the fall, defendant hospital released plaintiff without informing him that he had sustained injuries. See *id.* (same). The court did not accept the hospital's argument that charitable immunity precluded liability for hospital negligence. See *id.* at 287 (discussing court's reasoning).

40. See 141 A.2d 273, 274 (N.J. 1958) ("The New Jersey cases which applied either the immunity or the exception thereto recognized no distinction which turned on the issue of whether the particular charity catered primarily to the well-being of the body, the mind or the spirit . . ."); see also Bottari, *supra* note 19, at 65 (discussing extension of *Collopy* holding in *Dalton*).

41. *Dalton*, 141 A.2d at 274 (explaining that there is "no basis" for limiting holding in *Collopy* to hospitals at exclusion of "churches and similar charitable institutions").

42. See *Benton*, 141 A.2d at 299 (holding that charitable immunity does not apply to organization).

43. See *Collopy*, 141 A.2d at 278–83 (explaining rationale for holding). But see *D'Amato v. Orange Mem'l Hosp.*, 127 A. 340, 341 (N.J. 1925) (justifying charitable immunity on public policy grounds).

later overruled.⁴⁴ Dicta by Lord Cottenham in *Duncan v. Findlater*⁴⁵ and *Footees of Heriot's Hospital v. Ross*⁴⁶ provided the basis for charitable immunity in England.⁴⁷ Adhering to this dicta, the court held in *Holliday v. St. Leonard, Shoreditch*⁴⁸ that the vestry of a parish was immune from tort liability.⁴⁹ Nevertheless, charitable immunity was short-lived.⁵⁰ Five years later, the court rejected Lord Cottenham's dicta in *Mersey Docks Trustees v. Gibbs*.⁵¹ In 1871, the court reversed *Holliday* in *Foreman v. Mayor of Canterbury*.⁵² Subsequent English cases followed both *Mersey Docks* and *Foreman* and refused to recognize charitable immunity.⁵³

Mindful of the changes in English law, the New Jersey Supreme Court in *Collopy* criticized the adoption of charitable immunity in the United States.⁵⁴ Massachusetts was the first state to adopt the doctrine in *McDonald v. Massachusetts General Hospital*.⁵⁵ The *McDonald* court mistakenly applied *Holliday*, which had since been overruled, and held that a charitable

44. See *Collopy*, 141 A.2d at 278 (discussing tenuous basis of charitable immunity in light of English common law); see also Bottari, *supra* note 19, at 61–62 (chronicling development of charitable immunity in England and its subsequent abolishment).

45. 7 Eng. Rep. 934 (H.L. 1839) (holding that trustees are not liable for negligence of persons who are not trustees' servants).

46. 8 Eng. Rep. 1508, 1510 (H.L. 1846) (refusing to award damages out of trust fund because doing so would divert funds from original purpose). "To give damages out of trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." *Id.*

47. See *Collopy*, 141 A.2d at 278 (explaining way in which English court came to recognize charitable immunity). See generally *Brown v. Anderson County Hosp. Ass'n*, 234 S.E.2d 873, 875 (S.C. 1977) (describing development of charitable immunity act in England); Bottari, *supra* note 19, at 61–62 (discussing basis for charitable immunity).

48. 142 Eng. Rep. 769 (1861).

49. *Id.* (denying recovery against parish for injury resulting from highway defect).

50. See *Collopy*, 141 A.2d at 278 (remarking that court quickly overturned holding in *Holliday*).

51. 11 Eng. Rep. 1500 (1866) (rejecting principle of charitable immunity expressed in *Holliday*); see also *Brown*, 234 S.E.2d at 875 (discussing demise of charitable immunity in English common law).

52. 6 Q.B. 214 (1871); see also *Brown*, 234 S.E.2d at 875 (discussing abolishment of charitable immunity in English common law).

53. See, e.g., *Hillyer v. Governors of St. Bartholomew's Hosp.*, 2 K.B. 820, 825 (Eng. C.A. 1909) (refusing to apply charitable immunity).

54. See *Collopy*, 141 A.2d at 278 (explaining that *McDonald* introduced charitable immunity to United States "rel[ying] entirely on the *Holliday* case without recognizing that it had already been overruled"). For a discussion of *McDonald*, see *infra* notes 55–57 and accompanying text.

55. 120 Mass. 432, 436 (1876) (adopting charitable immunity doctrine); see also *Collopy*, 141 A.2d at 278 (noting that American courts first considered issue of charitable immunity in *McDonald*); Bottari, *supra* note 19, at 62 (stating that "Massachusetts court applied the *Holliday* result in a case of first impression in this country").

hospital is immune from tort liability.⁵⁶ Other states followed suit and adopted charitable immunity.⁵⁷ The courts' misplaced reliance on *Holliday* was not revealed until 1942, when Justice Rutledge delivered his opinion in *President of Georgetown College v. Hughes*.⁵⁸ This opinion exposed the "historical error" courts committed by relying on *Holliday*.⁵⁹ Following this revelation, state courts, which had previously adopted charitable immunity in reliance on *McDonald*, began rejecting the doctrine.⁶⁰

56. See *McDonald*, 120 Mass. at 436 (adopting charitable immunity doctrine); see also Jennifer S. Anderson, Comment, *All True Histories Contain Instruction: Why HMOs Cannot Avoid Malpractice Liability Through Independent Contracting with Physicians*, 29 McGEORGE L. REV. 323, 331 (1998) ("Charitable immunity, as applied in the United States, was based on a jurisprudential mistake."); John R. Feather, Comment, *The Immunity of Charitable Institutions from Tort Liability*, 11 BAYLOR L. REV. 86, 88-89 (1959) (describing *McDonald* court's application of *Holliday* as "error"). The *McDonald* court summarized the holding in *Holliday*:

Where actions have been brought against commissioners of public works serving gratuitously, for negligence in carrying on the work, by which injury has occurred, it has been held that they were not liable if proper care had been used by them in selecting those who were actually to perform the work.

Anderson, *supra*, at 331. The court then expressly adopted this holding as law. See *id.* (stating that liability cannot extend beyond that discussed in *Holliday*).

57. See *Collopy*, 141 A.2d at 278 (noting state courts' adherence to decision in *McDonald*); see, e.g., *Downes v. Harper Hosp.*, 60 N.W. 42, 43 (Mich. 1894) (adopting charitable immunity and citing *McDonald* in support of decision); *Perry v. House of Refuge*, 63 Md. 20, 26-28 (Md. 1885) (adopting charitable immunity in reliance on *McDonald* and English common law).

58. 130 F.2d 810, 815-16 (D.C. Cir. 1942) (describing adoption of charitable immunity in United States as "accidental"); see also *Collopy*, 141 A.2d at 278 (discussing impact of Justice Rutledge's opinion in *Hughes*); Bottari, *supra* note 19, at 62 (explaining significance of Justice Rutledge's opinion).

59. See Bottari, *supra* note 19, at 62 (recounting development and subsequent demise of charitable immunity). In his opinion, Justice Rutledge criticized the adoption of charitable immunity. See *Hughes*, 130 F.2d at 816 (exposing error courts made in relying on English common law). He stated:

Massachusetts adopted the repudiated rule of [*Holliday*] in [*McDonald*] and Maryland followed [*The Feoffees of Heriot's Hospital v. Ross*] in *Perry v. House of Refuge*. Apparently both courts acted in ignorance of the English reversal. In any event, they resurrected in America a rule already dead in England, and thereby gave Lord Cottenham's dictum a new lease on life in the New World.

Id. (citation omitted).

60. See, e.g., *Ray v. Tucson Med. Ctr.*, 230 P.2d 220, 229 (Ariz. 1951) (rejecting charitable immunity); *St. Luke's Hosp. Ass'n v. Long*, 240 P.2d 917, 920 (Colo. 1952) (holding that charities are not immune from tort liability though their trust funds are protected); *Durney v. St. Francis Hosp.*, 83 A.2d 753, 758 (Del. Super. Ct. 1951) (rejecting charitable immunity); *Wheat v. Idaho Falls Latter Day Saints Hosp.*, 297 P.2d 1041, 1042 (Idaho 1956) (same); *Haynes v. Presbyterian Hosp. Ass'n*, 45 N.W.2d 151, 154 (Iowa 1950) (same); *Noel v. Menninger Found.*, 267 P.2d 934, 938 (Kan. 1954) (same); *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957) (same); *Rickbeil v. Grafton Deaconess Hosp.*, 23 N.W.2d 247, 257 (N.D. 1946) (same); *Albritton v. Neighborhood Ctrs. Ass'n for Child Dev.*, 466 N.E.2d 867, 871 (Ohio 1984) (same); *Foster v. Roman Catholic Diocese*, 70 A.2d 230, 237 (Vt. 1950) (same); *Pierce v. Yakima Valley Mem'l Hosp. Ass'n*, 260 P.2d 765, 775 (Wash. 1953) (same); see also Bottari, *supra* note 19, at 62-63 (explaining that re-

Next, the New Jersey Supreme Court critically evaluated the court's reasoning in *D'Amato*.⁶¹ As discussed above, *D'Amato* relied on three state court decisions from New York, Massachusetts and Pennsylvania.⁶² One of these decisions was *McDonald*, which relied on the previously overruled decision in *Holliday*.⁶³ Another decision cited in *D'Amato*, *Schloendorff v. Society of New York Hospital*,⁶⁴ was overturned prior to *Collopy*.⁶⁵ After noting the weak precedent used by the *D'Amato* court, the *Collopy* court further criticized *D'Amato* on the grounds that the "public policy" justification was not sufficiently supported.⁶⁶

Finally, the New Jersey Supreme Court supported its decision in *Collopy* by identifying changes in society's mores.⁶⁷ The court recognized that at the time the court decided *D'Amato*, public policy may have supported

jection of doctrine stemmed from both revelation of "historical error" and "evolving public needs").

61. See *Collopy*, 141 A.2d at 280 (pointing out that *D'Amato* relied on problematic precedent and did not fully explain how "public policy" justified its holding).

62. See *D'Amato v. Orange Mem'l Hosp.*, 127 A. 340, 341 (N.J. 1925) (summarizing *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (N.Y. 1914), *Gable v. Sisters of St. Francis*, 75 A. 1087 (Pa. 1910) and *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876)).

63. See *id.* (citing and relying on *McDonald*). For a discussion of *McDonald* and its reliance on *Holliday*, see *supra* notes 55–57 and accompanying text.

64. 105 N.E. 92 (N.Y. 1914).

65. See *Collopy*, 141 A.2d at 280 (explaining that *Schloendorff* was overruled in 1957 by *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957)). In *Bing*, the court rejected charitable immunity for hospitals. See *Bing*, 143 N.E.2d at 8–9 (reasoning that "hospitals should . . . shoulder the responsibilities borne by everyone else"). The court explained that hospital exemption from respondeat superior should cease. See *id.* at 8 (noting "[l]iability is the rule, immunity the exception"). Furthermore, the court expressed its opinion that charitable immunity no longer served society's interests. See *id.* at 9 (explaining reason for abolishing charitable immunity). It stated, "[t]he rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded." *Id.*

66. See *Collopy*, 141 A.2d at 280 (commenting on lack of documentation for Chancellor's "expression of public policy"). "[T]he only ground advanced in *D'Amato* in support of its holding" was flawed. See *id.* (criticizing reasoning in *D'Amato*). "[T]he Chancellor did not document his expression of public policy, nor did he discuss the underlying reasons for the court's conclusion that it should then declare the immunity." *Id.*

67. See *id.* at 282 ("It may perhaps be that when *D'Amato* was rendered in 1925 it accurately represented the then prevailing notions of public policy. But times and circumstances have changed and we do not believe that it faithfully represents current notions of rightness and fairness."); see also *President of Georgetown Coll. v. Hughes*, 130 F.2d 810, 824 (D.C. Cir. 1942) ("Changes in the law and in the organization and mores of community life have taken away [the] major force [of the chief arguments for sustaining charitable immunity]."). Fostering the development of charitable organizations and encouraging donations were the public policy reasons offered in support of charitable immunity. See Feather, *supra* note 56, at 93–94 (discussing evolution of public policy justification for charitable immunity). After charitable organizations became more entrenched in American society, however, public policy concerns shifted to concern for individuals. See *id.* at 94. "Immunity inclines a person to carelessness and disregard for the rights of

charitable immunity.⁶⁸ The court explained that public policy had since changed, placing greater emphasis on general principles of fairness and due care by all.⁶⁹ Increased availability of insurance further impacted the court's determination by providing reassurance that charitable funds would not diminish completely as a result of charitable immunity's abolishment.⁷⁰

3. *Legislative Response*

In response to the New Jersey Supreme Court's abolishment of charitable immunity, the New Jersey legislature immediately reinstated the doc-

others, while liability inclines a person to care and dutiful consideration for the safety of others." *Id.*

68. *See Collopy*, 141 A.2d at 282 (acknowledging that *D'Amato* may have represented prevailing public policy notions at time of decision). *But see* Lester W. Feezer, *The Tort Liability of Charities*, 77 U. PA. L. REV. 191, 193 (1928) (expressing opinion that by 1928 "social concepts" had evolved to point where charitable immunity was no longer responsive to societal needs).

69. *See Collopy*, 141 A.2d at 282 (discussing evolution of society's conception of public policy); *see also Bing*, 143 N.E.2d at 9 (commenting on modern perceptions of justice and fairness).

70. *See Collopy*, 141 A.2d at 282 (citing *Lokar v. Church of the Sacred Heart*, 133 A.2d 12, 24 (N.J. 1957) (Wachenfeld, J., concurring)) (emphasizing that availability of insurance makes charitable immunity less important); *see also Hughes*, 130 F.2d at 828 (citing availability of insurance as one reason for rejection of charitable immunity by District of Columbia Court of Appeals in 1942); Daniel A. Barfield, *Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?*, 29 VAL. U. L. REV. 1193, 1195 (1995) (citing "development of . . . advanced insurance industry" as reason majority of jurisdictions "repudiated or substantially limited" charitable immunity); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 548-49 (1998) ("The increasing size of charities and their ability to obtain insurance has had an impact on the charitable immunity doctrine . . . [it] has been forsaken due to changes in the world of insurance."). *But cf. Schiltz*, *supra* note 4, at 956-58 (discussing problems with liability insurance for churches confronted with clergy sexual abuse litigation); Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 411 (1991) (expressing opinion that increased insurance costs have played role in "charitable immunity counter-trend"). Victims often report clergy sexual abuse a number of years after it occurs. *See Schiltz*, *supra* note 4, at 956 (discussing difficulty locating insurance policy held at time of abuse when victims do not report abuse until many years later).

When a church is sued for misconduct that occurred in 1960, it is unlikely that the church will be able to identify the company that insured it at that time. Even if the church can identify the insurer, it likely cannot prove the scope or limits of its coverage . . . when churches [do] locate old insurance policies, they usually find that the limits of coverage are grossly inadequate. A \$10,000 liability policy provided ample protection in 1960; it does not in 2003.

Id. Churches have also encountered difficulty because "for the past decade or so, policies that insure churches have excluded coverage for liability arising out of sexual misconduct." *Id.* at 956-57; *see also O'Reilly & Strasser*, *supra* note 4, at 69-70 (explaining that some insurance companies "provid[e] lower coverage limits on sexual molestation claims than under the general liability coverage").

trine.⁷¹ The legislature included an expiration date of June 30, 1959 for the law reinstating charitable immunity.⁷² On June 11, 1959, the expiration date became moot when the state governor signed the New Jersey Charitable Immunity Act into law.⁷³ To date, this Act is still in place.⁷⁴

71. See Bottari, *supra* note 19, at 66 (stating that New Jersey legislature “resurrected” charitable immunity when it signed sections 16:1-48 to 53 of Revised Statutes into law on July 22, 1958). The language of this statute reviving charitable immunity and the New Jersey Charitable Immunity Act enacted in 1959 were identical, with one exception—the first statute had an expiration date. See *id.* at 66 (explaining development of Charitable Immunity Act).

72. See *id.* (stating expiration date of statute). There are various explanations for the expiration date. See *id.* (speculating about reasons legislature initially included expiration date for charitable immunity statute). One possibility is that the legislature included an expiration date in case public opposition arose in response to the statute. See *id.* (same). There has also been speculation that the legislature intended the statute to provide charities with enough time to procure liability insurance. See *id.* (same).

73. See N.J. STAT. ANN. § 2A:53A-7 (West 2004) (establishing charitable immunity with no fixed expiration date).

74. See *id.* (reflecting current status of charitable immunity in New Jersey). Although the Charitable Immunity Act is still in place, members of the legislature have repeatedly proposed bills to amend the Act. In February 2000, New Jersey state Senators Joseph F. Vitale and Louis C. Bassano introduced a bill to modify the Charitable Immunity Act. See S. 965, 209th Leg., 2000–01 Sess. (N.J. 2000) (attempting to modify Charitable Immunity Act to give minor victims of sexual abuse redress against charitable organizations). It stated:

The immunity from civil liability granted to a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes pursuant to the provisions of [the New Jersey Charitable Immunity Act] shall not apply in any civil action which alleges that the negligent hiring or supervision of any employee resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization. As used in this section, “sexual offense” means any crime defined in chapter 14 of Title 2C of the New Jersey Statutes.

Id. The Vitale/Bassano bill was referred to the Senate Judiciary Committee, but did not advance further. See NEW JERSEY LEGISLATURE, *Bills 2000–2001*, at <http://www.njeg.state.nj.us/bills/BillView.asp> (last visited Dec. 1, 2004) (providing bill’s history). In January 2002, Vitale introduced a bill identical to the 2000 Vitale/Bassano bill. See S. 843, 210th Leg., 2002–03 Sess. (N.J. 2002) (proposing amendment to eliminate charitable immunity where minors are sexually abused by employees of immune organizations). Like its predecessor, the 2002 Vitale bill was referred to the Senate Judiciary Committee but did not advance further. See NEW JERSEY LEGISLATURE, *Bills 2002–2003* [hereinafter *Bills 2002–2003*], at <http://www.njeg.state.nj.us/bills/BillView.asp> (last visited Dec. 1, 2004) (providing bill’s history). During the same legislative session, four additional state senators proposed a similar bill to amend the Charitable Immunity Act. See S. 1421, 210th Leg., 2002–03 Sess. (N.J. 2002) (proposing additional language for Charitable Immunity Act). That bill proposed adding the following language to the Act:

2. d. Nothing in [the Act] shall be deemed to grant immunity to any nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes for the negligent hiring or negligent supervision of any agent or servant of such corporation, society or association which resulted in sexual abuse, sexual assault or other crimes of a sexual nature committed against a person who was a beneficiary of the corporation, society or association.

The Charitable Immunity Act shields any “non profit corporation, society or association organized exclusively for religious, charitable or educational purposes” from tort liability arising from negligence.⁷⁵ The Act

3. Notwithstanding any other provision of law to the contrary, a nonprofit corporation, society or association shall be liable for the negligent hiring or negligent supervision of any agent or servant of such corporation, society or association which resulted in sexual abuse, sexual assault or other crimes of a sexual nature committed against a person who was a beneficiary of the corporation, society or association.

Id. After its introduction in the state senate, the bill was referred to the Senate Judiciary Committee, where it remained until the end of the legislative session. See *Bills 2002–2003, supra* (providing bill’s history). An identical bill introduced in the state assembly suffered the same fate—after its referral to the Assembly Judiciary Committee, it remained there for the duration of the legislative session. See A. 2141, 210th Leg., 2002–03 Sess. (N.J. 2002) (proposing identical amendment); see also *Bills 2002–2003, supra* (providing bill’s history). Although legislators again proposed this amendment in 2004 in the state senate and assembly, it has not advanced beyond referral to the respective judiciary committees. See S. 283, 211th Leg., 2004–05 Sess. (N.J. 2004) (proposing identical amendment in Senate in 2004); A. 2109, 211th Leg., 2004–05 Sess. (N.J. 2004) (proposing identical amendment in Assembly in 2004); see also NEW JERSEY LEGISLATURE, *Bills 2004–2005* [hereinafter *Bills 2004–2005*], at <http://www.njeg.state.nj.us/bills/BillView.asp> (last visited Dec. 1, 2004) (providing bill’s history). Another bill, proposed in January 2004 by Senator Vitale and Senator Nia H. Gill, has had greater success. See S. 540, 211th Leg., 2004–05 Sess. (N.J. 2004) (proposing modification of Charitable Immunity Act to permit lawsuits against charitable organizations that negligently hire or supervise employees who sexually abuse minors); see also *Bills 2004–2005, supra* (providing bill’s history). The language of the 2004 Vitale/Gill bill is identical to the 2000 Vitale/Bassano bill and the 2002 Vitale bill. Compare S. 540, 211th Leg., 2004–05 Sess. (N.J. 2004), with S. 965, 209th Leg., 2000–01 Sess. (N.J. 2000), and S. 843, 210th Leg., 2002–03 Sess. (N.J. 2002); see also A. 2512, 211th Leg., 2004–05 Sess. (N.J. 2004) (proposing amendment in assembly identical to 2004 Vitale/Gill senate bill). The proposed legislation would allow beneficiaries to sue charitable organizations when the organizations negligently hire or supervise employees who sexually abuse minors. Vitale Statement, *supra* note 22 (explaining purpose of Vitale/Gill bill). In his statement to the Senate Judiciary Committee, Vitale explained that “[t]he Charitable Immunity Act was originally designed to remove the threat of lawsuits to charitable organizations by beneficiaries of that organization However, with the increased prevalence of sex-abuse cases coming to light, charitable immunity edicts across the country have been coming under closer scrutiny than ever before.” NEWS FROM N.J. SENATE DEMOCRATS, *Charitable Immunity Testimony* (Jan. 26, 2004), at <http://www.njsendems.com/Releases/04/January/Vitale%20Charitable%20Immunity%20Testimony%2001-26-04.htm> (transcribing testimony of Senator Vitale at Senate Judiciary Committee meeting). Unlike identical bills in previous legislative sessions, the Senate passed the 2004 Vitale/Gill bill. See *Bills 2004–2005, supra* (providing bill’s history). The bill then moved to the assembly, where the Assembly Financial Institutions and Insurance Committee considered it. See *id.* (posting steps bill has taken during 2004 legislative session). On November 8, 2004, the bill was reported out of the Assembly Financial Institutions and Insurance Committee. See *id.* (same). To date, the assembly as a whole has not voted on the Vitale/Gill bill. See *id.* (same).

75. N.J. STAT. ANN. § 2A:53A-7. The statute states in pertinent part:

a. No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall

distinguishes between beneficiaries and nonbeneficiaries of charitable works—charitable immunity applies only where the beneficiary suffers injury.⁷⁶ It represents a minority position among United States jurisdictions.⁷⁷

suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association

c. Nothing in this section shall be deemed to grant immunity to: (1) any trustee, director, officer, employee, agent, servant or volunteer causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature

Id. While individuals affiliated with charitable organizations are not immune from liability resulting from gross negligence, the organization does retain immunity where its employees have committed grossly negligent acts. For a discussion of the distinction between the immunity afforded to individuals affiliated with charitable organizations and the organizations themselves, see *supra* note 7 and accompanying text.

76. See *id.* (establishing beneficiary/nonbeneficiary distinction for charitable immunity in tort actions arising out of negligence). “[I]mmunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants *where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association.*” *Id.* (emphasis added). In evaluating whether a plaintiff is a beneficiary for the purposes of the Charitable Immunity Act, the court must consider “whether the institution pleading the immunity, at the time in question was engaged in the performance of the charitable objectives it was organized to advance.” *Anasiewicz v. Sacred Heart Church*, 181 A.2d 787, 790 (N.J. Super. Ct. App. Div. 1962); see also *Rupp v. Brookdale Baptist Church*, 577 A.2d 188, 191 (N.J. Super. Ct. App. Div. 1990) (adhering to beneficiary status test established by *Anasiewicz*).

77. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. d (noting that majority of states do not recognize charitable immunity); JERRY PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 797 (2d ed. 1997) (noting that “substantial majority” of jurisdictions abolished charitable immunity); Gary Jones, *The Requirement That Private Hospitals Provide Emergency Care to Indigents as Eminent Domain*, 20 J. LEGIS. 179, 185 (1994) (remarking that charitable immunity is not majority rule); O’Reilly & Strasser, *supra* note 4, at 60 (stating that majority of states abolished charitable immunity either in part or in whole); Julie Johnson, Comment, *The Sanctuary Crumbles: The Future of Clergy Malpractice in Michigan*, 74 U. DET. MERCY L. REV. 493, 505 (1997) (stating that majority of states abolished charitable immunity); see, e.g., *Ray v. Tuscon Med. Ctr.*, 230 P.2d 220, 229–30 (Ariz. 1951) (abrogating charitable immunity in Arizona); *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 448 (Cal. 1963) (abrogating charitable immunity in California); *Talbot v. Waterbury Hosp. Corp.*, 164 A.2d 162 (Conn. Super. Ct. 1960) (abrogating charitable immunity in Connecticut); *Durney v. St. Francis Hosp., Inc.*, 83 A.2d 753, 758 (Del. Super. Ct. 1951) (abrogating charitable immunity in Delaware); *Haynes v. Presbyterian Hosp. Ass’n*, 45 N.W.2d 151, 154 (Iowa 1950) (abrogating charitable immunity in Iowa); *Bing v. Thunig*, 143 N.E.2d 3, 9 (N.Y. 1957) (abolishing charitable immunity in New York); *Albritton v. Neighborhood Ctrs. Ass’n for Child Dev.*, 466 N.E.2d 867, 871 (Ohio 1984) (abolishing charitable immunity in Ohio); *Kojis v.*

4. *Applying the Charitable Immunity Act to the Catholic Church Sexual Abuse Scandal*

In *Schultz v. Roman Catholic Archdiocese*, decided two decades after the enactment of the New Jersey Charitable Immunity Act, the New Jersey Supreme Court insulated the church from liability in a negligent hiring action resulting from clergy sexual abuse.⁷⁸ The victim was a prepubescent male who attended a school owned by the archdiocese and participated in a parish-sponsored Boy Scout troop.⁷⁹ A Franciscan brother, Robert Coakley, served as both a teacher in the school and scoutmaster for the troop.⁸⁰ While at Boy Scout camp, Coakley allegedly forced the victim to participate in “sexual contact.”⁸¹ Coakley allegedly continued this behavior when school resumed.⁸² Despite the fact that Coakley threatened the victim not to report the abuse, the victim informed his parents of the situation.⁸³ Ultimately, despite medical and psychological care, the victim committed suicide.⁸⁴ In response, his parents brought a negligent hiring action against the archdiocese.⁸⁵ The court held that the defense of charitable immunity was available to charities, including the church, sued by their beneficiaries under the theory of negligent hiring.⁸⁶

Doctors Hosp., 107 N.W.2d 131, 134 (Wis. 1961) (abrogating charitable immunity in Wisconsin); cf. MASS. GEN. LAWS ANN. ch. 231, § 84k (West 2004) (imposing \$20,000 cap on tort judgments against charitable organizations in Massachusetts).

78. See *Schultz v. Roman Catholic Archdiocese*, 472 A.2d 531, 536 (N.J. 1984) (determining that New Jersey Charitable Immunity Act precludes liability for charity under theory of negligence); see also Schiltz, *supra* note 4, at 959 (“Most often, plaintiffs argue that it was negligent for the church to ordain, hire, or retain a pastor after it knew, or should have known, something about the pastor that disqualified him from ministry.”). Successful negligent hiring actions “depend . . . on the existence of antecedent knowledge in the possession of religious superiors who were in a position to act on the knowledge so as to have prevented the sexual misconduct from occurring.” Chopko, *supra* note 4, at 1114. In *Schultz*, however, any “antecedent knowledge” of archdiocese superiors was inconsequential because the Charitable Immunity Act immunizes charitable institutions from tort liability arising out of negligence. See *Schultz*, 472 A.2d at 539 (holding that Charitable Immunity Act applies to archdiocese). For a discussion of the legislative history of the Charitable Immunity Act, see *infra* notes 123–34 and accompanying text.

79. See *Schultz*, 472 A.2d at 532 (stating facts of case).

80. See *id.* (same).

81. See *id.* (same).

82. See *id.* (same).

83. See *id.* (same).

84. See *id.* (same).

85. See *id.* (explaining how case was initiated).

86. See *id.* at 538–39 (stating holding in *Schultz*). *Schultz* had important implications for the church because many victims of clergy sexual abuse bring actions against the church under the theory of negligent hiring. See John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL'Y 25, 42 (1996) (discussing predominance of negligent hiring actions); Chopko, *supra* note 4, at 1114 (noting that negligent hiring, retention and supervision claims are “far more likely” than other claims). New Jersey first recognized the tort of negligent hiring in *DiCosola v. Kay*, 450 A.2d 508, 515 (N.J. 1982) (explaining that negligent hiring “addresses the risk created by exposing members of the public to a potentially dangerous individual”),

Schultz reflects the conflict between morality and the duty to uphold the law.⁸⁷ The court admitted that its “natural sympathies favor [finding an exception to charitable immunity].”⁸⁸ Nevertheless, the court was obligated to give effect to the legislature’s intent—liberal interpretation of the statute.⁸⁹ Despite this obligation, the court offered the following thoughts on the applicability of charitable immunity: “Perhaps the time has come

two years before the court decided *Schultz*. Despite the prevalence of negligent hiring actions in clergy sexual abuse litigation against the church, some scholars have raised First Amendment concerns about this cause of action. See Chopko, *supra* note 4, at 1115 (noting that negligent hiring actions may involve judicial inquiry into religious beliefs); see also O’Reilly & Strasser, *supra* note 4, at 43 (raising constitutional question of “[h]ow deeply into the incardination process and the canonical suspension power . . . a federal or state judge [can] immerse herself, before the constitutional line is crossed?”).

Negligent hiring actions are not the only theories victims of clergy sexual abuse may pursue in an action against the church. See Chopko, *supra* note 4, at 1111–24 (discussing various theories of liability). Vicarious liability is one possibility. See Schiltz, *supra* note 4, at 958 (discussing priests’ role as “agents of diocese”). *But cf.* Chopko, *supra* note 4, at 1113–14 (noting that “overwhelming majority rule [is] that religious organizations are not liable for sexual assaults committed by those who minister for them under the doctrine of respondeat superior”). Negligent supervision, often discussed simultaneously with negligent hiring, is another option for victims seeking to hold the church liable. See Arnold, *supra*, at 42–43 (describing relationship between negligent hiring and negligent supervision). The question in negligent supervision actions is “whether religious leaders were in possession of information which, if acted upon, could have prevented the harm upon which the lawsuit is based.” Chopko, *supra* note 4, at 1116.

A third possible theory of liability is breach of fiduciary duty. See Schiltz, *supra* note 4, at 961 (explaining that use of this type of action is increasing); see, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.2d 409, 429 (2d Cir. 1999) (applying fiduciary duty theory). Much like negligent hiring and supervision, however, constitutional barriers may impede success. See Chopko, *supra* note 4, at 1116–17 (“Of those courts that have reached the constitutional issue, many have rejected fiduciary duty claims against churches on constitutional grounds.”).

87. See *Schultz*, 472 A.2d at 539 (“Others must reconcile the issues of moral responsibility. As to legal responsibility, we find that the act charged here is negligence in hiring. Under New Jersey’s Charitable Immunity Act a charity is not liable for negligence.”); see also Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 500 (2000) (“[N]one of [the New Jersey Supreme Court justices] bothered to disguise their distaste for the policy reflected in the [Charitable Immunity Act] or for the result which it compelled. But . . . [the] court saw itself as an instrument of state policy and bowed to the will of the legislature.”).

88. *Schultz*, 472 A.2d at 535 (expressing dilemma presented by case).

89. See *id.* at 539 (noting that court was not free to interpret statute in light of common law because liberal construction is statutorily prescribed); see also *Monaghan v. Holy Trinity Church*, 646 A.2d 1130, 1135 (N.J. Super. Ct. App. Div. 1994) (stating that court should liberally construe Charitable Immunity Act). The legislature expressed its intent that courts construe the Charitable Immunity Act liberally. See N.J. STAT. ANN. § 2A:53A-10 (West 2004). The statute states:

[The Charitable Immunity Act] shall be deemed to be remedial and shall be *liberally construed* so as to afford immunity to the said corporations, societies and associations from liability as provided herein in furtherance of the public policy for the protection of nonprofit corporations, societies

for the Legislature to consider again the scope of the law and its intended application to new theories of liability.”⁹⁰ Members of the New Jersey legislature recently heeded this advice and proposed legislation that would abolish charitable immunity in New Jersey.⁹¹

III. JUSTIFICATIONS AND COUNTERARGUMENTS FOR CHARITABLE IMMUNITY

A. *Justifications in General*

Proponents of charitable immunity offer several justifications for the doctrine.⁹² There is no consensus about which rationale is, in fact, the primary justification.⁹³ Absent such a consensus, charitable immunity has become both “controversial” and “complex.”⁹⁴

1. *Trust Fund Theory*

The trust fund theory for charitable immunity is based on the idea that charitable funds are held in trust and, as a result, the charity cannot use the funds to pay tort liability judgments.⁹⁵ The theory emphasizes the

and associations organized for religious, charitable, educational or hospital purposes.

Id. (emphasis added).

90. *Schultz*, 472 A.2d at 539.

91. For a discussion of proposed amendments to the Charitable Immunity Act, see *supra* note 74 and accompanying text.

92. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (listing justifications for charitable immunity); see also *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 282 (N.J. 1958) (summarizing reasons to exempt charities from tort liability); *O'Reilly & Strasser*, *supra* note 4, at 59–61 (discussing various justifications); *Wells*, *supra* note 2, at 1213–18 (identifying rationales for charitable immunity); *Feather*, *supra* note 56, at 89 (noting that jurisdictions rely on “several different theories” to justify charitable immunity). See generally Mark J. Garwin, *Immunity in the Absence of Charity: EMTALA and the Eleventh Amendment*, 23 S. ILL. U. L.J. 1, 2 (1998) (noting that justifications of charitable immunity evolved over time, beginning with rationale that public trust funds cannot be diverted). Critics of the doctrine offer counterarguments for each justification. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (discussing weaknesses of each justification); *Wells*, *supra* note 2, at 1214–17 (countering public policy, trust fund and assumption of risk argument); see also *President of Georgetown Coll. v. Hughes*, 130 F.2d 810, 824 (D.C. Cir. 1942) (listing counterarguments to charitable immunity).

93. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (noting that there is no agreement upon which one theory justifies charitable immunity); see also *Wells*, *supra* note 2, at 1213 (remarking that courts rely on four different justifications for charitable immunity: trust fund theory, assumption of risk/implied waiver, inapplicability of respondeat superior and public policy).

94. See *Wells*, *supra* note 2, at 1213 (explaining origin of confusion surrounding charitable immunity); see also *Feather*, *supra* note 56, at 94 (“As a result of an abundance of doubtful theories and their variations, the law in regard to ‘immunity’ is generally in a state of confusion.”).

95. See *Wells*, *supra* note 2, at 1215 (explaining rationale for trust fund theory). Courts have relied on Lord Cottenham’s dicta in *Feoffees of Heriot’s Hospital v. Ross* when advancing the trust fund theory in support of charitable immunity. See Benjamin S. Birnbaum, Note, *Torts—Liability of Charitable Institution for the Negligence of its Employees*, 14 B.U. L. REV. 477, 478 (1934) (describing origin of trust

inviolability of donor intent.⁹⁶ That is, payment of tort damages from charitable funds “would be to divert funds from the purpose intended by the author of the trust.”⁹⁷

Critics point out several flaws in the trust fund theory.⁹⁸ First, tort claimants are not always precluded from reaching trust funds to satisfy tort judgments.⁹⁹ Second, because donors’ funds would not be exempt if they continued to hold them as their own, donors cannot “confer immunity upon [the funds]” simply by donating them to a charity.¹⁰⁰ Finally, the trust fund theory cannot justify the immunization of charities where only charitable beneficiaries are injured.¹⁰¹

fund theory). In *Feoffees of Heriot’s Hospital*, Lord Cottenham remarked, “[t]o give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose.” *Feoffees of Heriot’s Hospital v. Ross*, 8 Eng. Rep. 1508, 1510 (H.L. 1846).

96. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (explaining that charitable donations should not “be diverted from the purposes intended by their donors and applied to the payment of liabilities in tort”); Feezer, *supra* note 68, at 199 (“[T]he fund created by the benefactors of the charity would be diverted from the purpose for which it was set apart [if the charity used the fund to pay tort damages].”); see also *Hughes*, 130 F.2d at 822 (including concerns about upholding donor intent among arguments in favor of charitable immunity); Feather, *supra* note 56, at 89–90 (noting that donor intent/trust fund theory are based on English common law decisions).

97. Feather, *supra* note 56, at 89; see also RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (characterizing payment of damages resulting from tort liability as diversion of donor intent).

98. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (discussing weaknesses of trust fund justification); Feezer, *supra* note 68, at 199–200 (same); Wells, *supra* note 2, at 1215 (same); Feather, *supra* note 56, at 91–92 (same).

99. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (criticizing concept that charitable funds are subject to impenetrable trust); see also *Hughes*, 130 F.2d at 823 (noting that trusts are no longer unreachable by tort claimants). “A person to whom the trustee has incurred a liability in the course of the administration of the trust can by a proceeding in equity reach trust property and apply it to the satisfaction of his claim under the circumstances stated in §§ 268–271 A.” RESTATEMENT (SECOND) OF TRUSTS § 267 (1959).

100. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (describing inability of donors to make their assets immune); cf. Wells, *supra* note 2, at 1215 (commenting on unlikely possibility that “every donor has stipulated that his or her gift cannot be used for liability costs”).

101. See Feather, *supra* note 56, at 91 (explaining that trust fund theory only justifies “complete immunity”); see also Feezer, *supra* note 68, at 199 (noting that refusal to apply charitable immunity where nonbeneficiary is injured weakens trust fund theory). The trust fund theory weakens when the beneficiary/stranger distinction is made for application of charitable immunity because it permits diversion of donor intent in some circumstances. See Feather, *supra* note 56, at 91 (illustrating that beneficiary/stranger distinction causes structure of trust fund theory to collapse). Where strangers (nonbeneficiaries) are injured, donor intent is diverted because charities may use trust funds to pay judgments. See *id.* (same).

2. *Inapplicability of Vicarious Liability*

The next rationale offered in support of charitable immunity is that vicarious liability is inapplicable to charities because they receive no financial gain for services provided.¹⁰² Vicarious liability imposes strict liability on employers for employees' torts committed while the latter are acting within the scope of their employment.¹⁰³ In the context of the clergy sexual abuse scandal, the church contends that sexual abuse of minors is outside the scope of clerics' employment and is, therefore, insufficient grounds for imposition of liability.¹⁰⁴

Generally speaking, the argument that vicarious liability does not apply absent a "gain" by the employer misinterprets the law.¹⁰⁵ Vicarious liability depends on the employer-employee relationship rather than on profitability.¹⁰⁶ Moreover, analyzing the rationale in the context of the clergy sexual abuse scandal has led scholars to the conclusion that vicarious liability may, in fact, be appropriate.¹⁰⁷ First, within the hierarchy of the Roman Catholic Church, "priests function as the agents of the dioceses."¹⁰⁸ In addition, vicarious liability may be proper because "institu-

102. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (explaining that inapplicability of vicarious liability is one rationale for charitable immunity); Wells, *supra* note 2, at 1214 (same); Feather, *supra* note 56, at 90 (same).

103. See JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 136 (6th ed. 2003) (explaining vicarious liability); VANDALL, *supra* note 1, at 1041 (discussing basic concept of vicarious liability). "The classic vicarious liability scenario involves an employer being held liable for the negligent tort of an employee committed while the employee was acting in the scope of his or her employment." *Id.*

104. See Schiltz, *supra* note 4, at 958 (discussing church response to vicarious liability claims arising out of clergy sexual abuse).

105. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (stating that theory "runs counter to the whole law of vicarious liability"); Feather, *supra* note 56, at 93 (noting that theory is founded on "faulty premise").

106. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (explaining that vicarious liability depends on "the employment of the servant, the employer's direction and control over his conduct and the furtherance of the enterprise that [the employer] has set in motion"); Feather, *supra* note 56, at 93 (noting that employer's delegation of duties gives rise to respondeat superior).

107. See Schiltz, *supra* note 4, at 958-59 (discussing principal-agent relationship that can give rise to vicarious liability). Vicarious liability can be imposed under the theory of respondeat superior. See O'Reilly & Strasser, *supra* note 4, at 39 (explaining operation of respondeat superior in clergy sexual abuse actions against church). Liability may arise if the employee commits a tort while acting within the scope of his employment "or if other conditions of the principal-agent relationship are satisfied." See *id.* (same). "A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion." RESTATEMENT (SECOND) OF AGENCY § 216 (1958); see also Wells, *supra* note 2, at 1222 (concluding that exceptions exist to inapplicability of vicarious liability theory, which relate to clergy sexual abuse).

108. See Schiltz, *supra* note 4, at 958-59 (concluding that hierarchal structure gives rise to principal-agent relationship between priests and dioceses). The principal-agent relationship can give rise to vicarious liability. See *id.* at 958 (noting

tional negligence” has been a component of the clergy sexual abuse scandal.¹⁰⁹ Scholars have concluded that the church’s hierarchical and internal discipline structures contributed to an institutional approach that fueled the scandal.¹¹⁰

3. *Assumption of the Risk/“Implied Waiver” Theory*

A third theory supporting charitable immunity advances the argument that beneficiaries of charities also assume the risk of the charity’s negligence.¹¹¹ That is, one benefiting from charitable works “accepts them as they are given” and “by implication agrees to ‘waive’ the liability and assert no claim in tort against his benefactor.”¹¹² Sustaining this argument requires proof that the beneficiary waived tort claims both voluntarily and with full knowledge of the risk.¹¹³ Proof of these elements is difficult because recipients of charitable services have come to expect reasonable care.¹¹⁴ When recipients submit to charitable organizations, they

that existence of principal-agent relationship is fiercely litigated). *But cf.* John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. REV. 1167, 1171–72 (2003) (explaining that difficulty arises from characterizing church-priest relationship as principal-agent relationship because “the prohibition against answering religious questions forbids looking to church law or structure to see if such a relationship exists”).

109. *See* Wells, *supra* note 2, at 1222 (identifying three relevant factors, including institutional negligence, that impact vicarious liability analysis). When analyzing whether it is appropriate to impose vicarious liability on charitable organizations, there are three relevant factors: (1) whether the charity charges for its services and raises substantial funds; (2) the amount of damages sought by plaintiff; and (3) whether “institutional negligence” is involved. *See id.* (enumerating factors). To determine whether there is “institutional negligence,” “[t]he question is whether the negligent conduct is really attributable to employees or whether it represents the conscious policy of the institution.” *Id.*

110. *See* Doyle & Rubino, *supra* note 8, at 615 (discussing impact of hierarchical structure on bishops’ responses to clergy sexual abuse); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 321 (2003) (discussing impact of church’s preference for internal disciplining of abusive clergy). For a discussion of the church’s hierarchal and internal discipline structures and their impact on the clergy sexual abuse scandal, see *infra* notes 149–89 and accompanying text.

111. *See* RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (discussing “waiver” theory as justification for charitable immunity); Feezer, *supra* note 68, at 202 (noting that waiver theory gained prominence in 1901); Wells, *supra* note 2, at 1215–16 (describing assumption of risk rationale for charitable immunity); Feather, *supra* note 56, at 90 (characterizing justification as “‘implied waiver’ theory” and noting that it frequently arises in negligence actions against charitable hospitals). “The substance of this theory is that by accepting the services of a charity, the beneficiary impliedly waives liability or assumes the risk of the charity’s negligent employees.” Feather, *supra* note 56, at 90.

112. RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (discussing assumption of risk rationale).

113. *See* Wells, *supra* note 2, at 1216 (describing elements of assumption of risk theory: voluntary and knowing waiver).

114. *See* RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (“The recipient in fact understands and expects that he will be treated with reasonable care . . .”). This theory is especially difficult to support when the plaintiff is not a beneficiary

are not necessarily cognizant of the legal principles implicit in the waiver theory.¹¹⁵ A waiver, then, “would be wholly fictitious.”¹¹⁶

4. Public Policy

Finally, a general “public policy” justification seeks to ensure the continued viability of charitable enterprises.¹¹⁷ Proponents of charitable immunity contend that donations may decrease if donors know charities may use their funds to pay tort claims.¹¹⁸ A decrease in charitable funds may have substantial impact on the services offered by a charity, thereby injuring the charitable beneficiaries as a whole.¹¹⁹

of the charity’s works. See Wells, *supra* note 2, at 1216 (illustrating flaw in the assumption of risk rationale). “It can hardly be supposed that one who is struck by a charitable bloodmobile has made a knowing and voluntary waiver of his rights.” *Id.* (noting illogical result where waiver theory is applied to nonbeneficiary).

115. See Feather, *supra* note 56, at 92 (discussing illogical results created by waiver theory). Patients in charitable hospitals are illustrative of the difficulty encountered in sustaining the implied waiver theory: “[a] patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that courts after years of travail have at last produced.” *Id.* (quoting *Lindler v. Columbia Hosp.*, 81 S.E. 512, 515 (S.C. 1914) (Fraser, J., dissenting)).

116. See *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 282 (N.J. 1958) (criticizing argument that charitable beneficiaries waive all tort claims against charitable entities).

117. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (discussing public policy objective of encouraging charitable entities); Feezer, *supra* note 68, at 206 (noting that public policy argument in favor of charitable immunity relies on notion that charities perform “quasi-governmental work by performing a function which the government must otherwise undertake”); O’Reilly & Strasser, *supra* note 4, at 60 (explaining that public policy justification advocates encouragement of “charitable endeavors” because charities provide benefits to society); Feather, *supra* note 56, at 90–91 (describing public policy justification as “practical basis for all of the [other] theoretical bases”). In *Ettlinger v. Trustees of Randolph-Macon College*, 31 F.2d 869 (4th Cir. 1929), the court summarized the public policy rationale:

A policy of the law which prevents [a charity’s beneficiary] from suing it for the torts of its agents and servants, and thus taking for [the beneficiary’s] private use the funds which have been given for the benefit of humanity, which shields gifts made to charity from the hungry maw of litigation and conserves them for purposes of the highest importance to the state, carries on its face its own justification, and, without the aid of metaphysical reasoning, commends itself to the wisdom of mankind.

Ettlinger, 31 F.2d at 872.

118. See RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (discussing fear that donations will be discouraged if charities can use them to pay tort judgments); Birnbaum, *supra* note 95, at 478 (noting that courts were concerned judgment awards against charities may discourage charitable donations); see also Schiltz, *supra* note 4, at 964 (“The people in the pews do not seem anxious to increase their donations to help pay the costs of litigation.”); Wells, *supra* note 2, at 1215 (noting that charitable immunity prevents defeat of donor intent and discouragement of charitable gifts).

119. See Schiltz, *supra* note 4, at 964–65 (explaining impact of litigation costs on churches). “Because it is not realistic to expect donations to increase, churches have no alternative but to pay for litigation by cutting back on the services they provide.” *Id.* at 964 (noting “cutting back” may range from disposing of invest-

The consequence of this position is that the injured party must bear the cost of a charity's liability.¹²⁰ The Restatement (Second) of Torts admonishes this result, emphasizing the public interest "in proper care and treatment, and the compensation of harm done."¹²¹ Another corollary to the public policy rationale is that it forces a charitable contribution from the victim.¹²²

B. *Justifications for New Jersey Charitable Immunity Act*

1. *Justification as Expressed by New Jersey Legislature*

When enacting the Charitable Immunity Act, the New Jersey legislature focused on economic justifications for the doctrine.¹²³ The legislature emphasized the consequence of abolishing charitable immunity—possible depletion of charitable funds.¹²⁴ Accordingly, it structured the Charitable Immunity Act "so that the organization's funds could be put to better use in funding charitable works, instead of funding the cost of litigation

property to closing schools and shelters to meet financial obligations of litigation expenses); *see also* Birnbaum, *supra* note 95, at 478 (noting that at inception of public charities, courts agreed to shield them from tort liability in order to foster their development).

120. *See* Wells, *supra* note 2, at 1214 ("We can free charities from liability costs only by transferring them to injured parties.").

121. RESTATEMENT TORTS, *supra* note 4, § 895E cmt. c (providing justifications for charitable immunity).

122. *See* Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867, 870–71 (Ohio 1984) (discussing problematic consequences of charitable immunity).

[A] policy exempting a charitable organization from having to compensate for harm caused by it is equivalent to requiring an injured individual to make an unwilling contribution to that organization in the amount of the compensation which would be due him had he been injured by a noncharitable entity. Such coerced donations are inimical to the whole concept of charitable donation and service. They are, to say the least, distinctly uncharitable.

Id. (describing charitable immunity as uncharitable); *see also* Wells, *supra* note 2, 1214–15 (exploring concept of "forced contribution"); Feather, *supra* note 56, at 86 (noting that, when plaintiffs cannot recover due to charitable immunity of defendant institution, they are effectively forced "to contribute to the maintenance of [the] charitable institution").

123. *See* Schultz v. Roman Catholic Archdiocese, 472 A.2d 531, 537 (N.J. 1984) (citing *Exemption of Religious, Charitable and Hospital Organizations from Negligence Liability: Hearing on S. 204 Before the Assembly Judiciary Committee*, 1958 Leg., 188th Sess. (N.J. 1958)) (identifying economic concerns as focus of Charitable Immunity Act); *Vitale Statement*, *supra* note 22 (identifying original purpose of Charitable Immunity Act).

124. *See* Schultz, 472 A.2d at 537 (describing legislature's primary concern—continued economic viability of charitable organizations—during consideration of Charitable Immunity Act).

tion against an organization.”¹²⁵ The legislature did not focus on the historical inconsistencies in the doctrine that troubled the court in *Collopy*.¹²⁶

2. *Justification as Interpreted by the New Jersey Supreme Court*

In *O’Connell v. State*,¹²⁷ the New Jersey Supreme Court evaluated the legislative history of the Charitable Immunity Act and offered its own interpretation of the legislature’s intent.¹²⁸ The court found “that preservation of a charity’s assets was only one of a number of purposes propelling the [Charitable Immunity Act’s] enactment.”¹²⁹ The assumption of the risk rationale was also influential in the legislature’s decision.¹³⁰ The inclusion of the “‘beneficiary/stranger’ distinction” in the Act led the court to this conclusion.¹³¹ First, use of the term “beneficiary” is associated with the assumption of the risk justification.¹³² Second, inclusion of the term cannot be reconciled with the primary justification for the Act: preservation of charitable assets.¹³³ As the court explained, “[t]he imposition of tort liability has the potential to deplete a charitable fund regardless of whether the judgment is paid to a beneficiary or a stranger.”¹³⁴

125. *Vitale Statement*, *supra* note 22 (stating rationale for substance of statute—preservation of charitable funds).

126. *See Schultz*, 472 A.2d at 537 (explaining that New Jersey legislature did not strive for consistency with common law conception of charitable immunity while drafting Charitable Immunity Act).

127. 795 A.2d 857 (N.J. 2002).

128. *See id.* at 859 (explaining that court’s goal was to determine legislative intent when interpreting statutes). In *O’Connell*, the court considered whether a university was entitled to charitable immunity, despite its failure to pay judgments from the funds of the educational institution. *See id.* at 858–59 (providing facts and procedural posture of case).

129. *Id.* at 864 (interpreting legislative history to discern intent).

130. *See id.* (discussing evidence that waiver theory influenced New Jersey legislature).

131. *See id.* (explaining that term “beneficiary” is associated with waiver theory); *see also Wells*, *supra* note 2, at 1222 (“[T]he distinction between suits by a charitable beneficiary and suits by a stranger will not be relevant once we dismiss the assumption of the risk rationale for charitable immunity.”).

132. *See O’Connell*, 795 A.2d at 864–65 (discussing connection between use of “beneficiary/stranger” distinction in Charitable Immunity Act and assumption of risk rationale). The assumption of the risk rationale for charitable immunity justifies the imposition of immunity where charitable beneficiaries are injured. *See id.* (citing 5 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 29.16, 759–60 (2d ed. 1986)). The Charitable Immunity Act immunizes charities under these circumstances. *See* N.J. STAT. ANN. § 2A:53A-7 (West 2004) (immunizing charitable organizations against negligence claims by beneficiaries).

133. *See O’Connell*, 795 A.2d at 864 (noting that public policy justification—preservation of charity’s assets—cannot fully explain inclusion of beneficiary/stranger distinction).

134. *Id.* (same).

IV. CHARITABLE IMMUNITY AND THE CATHOLIC CLERGY
SEXUAL ABUSE SCANDAL

Consideration of the New Jersey Charitable Immunity Act in the context of the clergy sexual abuse scandal has sparked a movement for abolition of the doctrine in situations involving sexual abuse of minors.¹³⁵ The unique character of the scandal may justify this response.¹³⁶ First, clergy sexual misconduct in the Catholic Church has produced more than occasional victims.¹³⁷ Second, the church has played a direct role in enabling clergy sexual abuse to reach epidemic proportions.¹³⁸ Finally, the propensity of New Jersey's dioceses to settle clergy misconduct lawsuits has under-

135. For a discussion of proposed amendments to the Charitable Immunity Act that would eliminate immunity where charities negligently hire or supervise employees who sexually abuse minors, see *supra* note 74 and accompanying text.

136. See Doyle & Rubino, *supra* note 8, at 555 (noting that church inefficiencies in addressing clergy sexual abuse has encouraged victims to seek relief from civil court system). Clergy sexual abuse victims have expressed frustrations with the response of church leadership to allegations of abuse. See *id.* (describing perceptions of post-1984 victims of clergy sexual abuse); O'Brien, *supra* note 2, at 373 (criticizing church's response to clergy sexual abuse scandal as unresponsive to "horror visited upon the victims"). Victims are concerned that the church "minimizes their claims" and that it responds to allegations with "[e]mpty assurances that perpetrators would be properly dealt with." Doyle & Rubino, *supra* note 8, at 555.

137. See U.S. CONFERENCE OF CATHOLIC BISHOPS, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States: A Research Study Conducted by the John Jay College of Criminal Justice* [hereinafter *John Jay Study*], at <http://www.usccb.org/nrb/johnjaystudy> (last visited Nov. 18, 2004) (providing statistics that prove clergy sexual abuse of minors is widespread). For a discussion of the number of victims and perpetrators in the clergy abuse scandal, see *infra* notes 145–48 and accompanying text.

138. See Coughlin, *supra* note 2, at 977 (concluding that bishops' failure to abide by canon law contributed to the current crisis); Janice Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 19 (1996) (discussing church shortcomings that contributed to continuation of abuse, namely transferring abusive priests among parishes); Rod Dreher, *Catholic Hierarchy Responsible for Abusive Priests*, PATRIOT LEDGER (Quincy, Mass.), Jan. 23, 2002, at 13 (blaming church's "tepid response" to abuse scandal for victims' injuries and financial toll on church); see also Doyle & Rubino, *supra* note 8, at 615 ("Sexual abuse committed by clergy members is not something isolated from the dynamics of the Church's power structure."); Smith, *supra* note 2, at 412 (noting church hierarchy's "obsession" with protecting abusive priests); Michael Paulson, *Abuse Scandal Angers Conservative Catholics*, BOSTON GLOBE, Mar. 27, 2002, at A1 (expressing conservative Catholics' opinion that church hierarchy is responsible for clergy sexual abuse scandal); U.S. CONFERENCE OF CATHOLIC BISHOPS, *Charter for the Protection of Children & Young People* (2002) [hereinafter *Charter*], at <http://www.usccb.org/ocyp/charter.htm> ("As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past."). For a discussion of the impact the church hierarchal structure and internal discipline had on clergy sexual abuse, see *infra* notes 149–89 and accompanying text.

mined the Act's legislative intent—ensuring economic prosperity of charitable entities.¹³⁹

A. Clergy Sexual Abuse Is Distinct from Occasional Injury

The clergy sexual abuse scandal has revealed the expansive character of the problem, which scholars and bishops alike have characterized as a crisis.¹⁴⁰ The Charitable Immunity Act values the benefit of charitable works to society over the “occasional” victim.¹⁴¹ Statistical data, however, calls into question whether victims of clergy sexual abuse are actually “occasional” victims.¹⁴²

Clergy sexual abuse of minors is “widespread.”¹⁴³ Results of a research study commissioned by the United States Conference of Catholic Bishops (UCCB) illustrate the problem's scope.¹⁴⁴ Out of one hundred and ninety-five dioceses and eparchies participating in the study, all but seven had received allegations that at least one of their priests had sexually abused a minor.¹⁴⁵ Within American dioceses, victims have accused ap-

139. For a discussion of settlement agreements entered into by New Jersey's five dioceses, see *infra* notes 204–18 and accompanying text.

140. See, e.g., Coughlin, *supra* note 2, at 977 (characterizing clergy sexual abuse as crisis); O'Brien, *supra* note 2, at 365 (describing clergy sexual abuse scandal as “the crisis within the American Catholic Church”); Charter, *supra* note 138 (stating in Preamble of Charter that “[t]he Church in the United States is experiencing a crisis without precedent in our times”).

141. See Bottari, *supra* note 19, at 85 (“It is submitted that the far-reaching benefits of bona fide charitable, educational, and religious organizations outweigh the harm suffered by the occasional plaintiff who has sustained an injury.”) (emphasis added); see also Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 8 IOWA L. REV. 1293, 1321 (1997) (“The primary justification for charitable immunity is that society's interest in maintaining charities outweighs the interest in compensating the limited number of resulting tort victims.”). The dictionary defines “occasional” as “encountered, occurring, appearing, or taken at irregular or infrequent intervals.” WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 816 (9th ed. 1987).

142. See *John Jay Study*, *supra* note 137 (reporting that 10,667 individuals alleged clergy sexual abuse of minors between 1950 and 2002).

143. See O'Brien, *supra* note 2, at 365 (describing clergy sexual abuse as “so widespread, so horrendous, and so clandestine”); *John Jay Study*, *supra* note 137 (providing statistics illustrating extent of clergy sexual abuse crisis). Eighty-one percent of victims were male. See *id.* (describing offense characteristics). The largest group of victims were between ages eleven and fourteen. See *id.* (same). It was not unusual for clergy sexual abuse to affect multiple children in a family. See *id.* (“Of those who alleged abuse . . . 17.2% of them had siblings who were also allegedly abused.”).

144. See *John Jay Study*, *supra* note 137 (providing statistical data relating to church clergy sexual abuse scandal). But see Schiltz, *supra* note 4, at 953 (expressing opinion that no studies provide reliable estimates). Other research studies, however, report similar findings. See, e.g., Arnold, *supra* note 86, at 26 (discussing results of study conducted by Graduate Theological Union); Goodstein, *supra* note 2, at 1 (discussing results of *New York Times* survey).

145. See *John Jay Study*, *supra* note 137 (providing statistical data relating to church clergy sexual abuse scandal).

proximately four percent of Catholic priests and deacons of sexually abusing them while the victims were minors.¹⁴⁶ The study estimates that 4,392 priests and deacons have abused 10,667 minors between 1950 and 2002.¹⁴⁷ The prevalent abuse evidenced by these statistics illustrates that clergy sexual misconduct does not occur infrequently.¹⁴⁸

B. *Institutional Roots of Clergy Sexual Abuse*

“Sexual abuse committed by clergy members is not something isolated from the dynamics of the church’s power structure.”¹⁴⁹ Both the hierarchical structure and the preference for internal discipline have contributed to the church scandal.¹⁵⁰ An examination of each sheds light on the choices bishops and dioceses made when responding to allegations of clergy sexual abuse.¹⁵¹

1. *Hierarchical Structure of Catholic Church*

The church hierarchy is one of the main reasons church authorities have faltered in effectively responding to allegations of clergy sexual

146. *See id.* (same).

147. *See id.* (same).

148. *See id.* (illustrating that clergy sexual abuse impacted large number of dioceses and victims between 1950 and 2002).

149. Doyle & Rubino, *supra* note 8, at 615 (explaining that actual sexual abuse cannot be understood without considering church’s structural influence); *see also* McNamara, *supra* note 13, at B1 (characterizing “official tolerance of pedophilia” as “the most obvious sign to institutional dysfunction”); National Catholic Reporter, *Church in Crisis: Interview of Dr. Leslie Lothstein by Katherine DiGiulio* (June 17, 2002) [hereinafter *Lothstein Interview*], available at <http://www.natcath.com/NCR-Online/archives/081602/lothstein.htm> (explaining that clergy sexual abuse “goes right to the heart and system and structure of the church”).

150. *See* Doyle & Rubino, *supra* note 8, at 558, 587, 615 (discussing impact of hierarchical structure on bishops’ responses to clergy sexual abuse); Logan, *supra* note 110, at 321, 330–36 (discussing impact of church’s preference for internal disciplining of abusive clergy). For a discussion of the church hierarchy’s role in the clergy sexual abuse scandal, *see infra* notes 152–73 and accompanying text. For a discussion of the church’s internal discipline structure and its role in the scandal, *see infra* notes 174–89 and accompanying text.

151. *See* Doyle & Rubino, *supra* note 8, at 558, 587 (describing hierarchical structure and bishops’ responses to clergy sexual abuse); Logan, *supra* note 110, at 330–36 (discussing internal discipline and practice of shielding priests from civil authorities).

abuse.¹⁵² In the church, individuals hold power.¹⁵³ The pope is the “supreme authority.”¹⁵⁴ Further down the hierarchy, the pope appoints bishops.¹⁵⁵ Bishops or archbishops control the “geographic division[s] of the Church, known as diocese[s] or archdiocese[s].”¹⁵⁶ Both the pope and bishops enjoy a tremendous amount of power.¹⁵⁷ The pope “possesses plenary power with respect to judicial, legislative, and executive functions for the entire Catholic Church.”¹⁵⁸ Bishops possess the same powers in each diocese, although they are under the pope’s ultimate authority.¹⁵⁹

The church hierarchy lacks “checks and balances,” which increases the potential for abuse of power.¹⁶⁰ To defend this arrangement, church officers rely on the proposition “[t]hat the hierarchical government sys-

152. See Doyle & Rubino, *supra* note 8, at 558 (identifying church governmental structure as predominant reason church did not adequately use canon law to address clergy sexual abuse); see also Smith, *supra* note 2, at 409–10 (attributing church’s failure to address clergy sexual abuse to church institutions “designed to protect priests”); *Lothstein Interview*, *supra* note 149 (blaming clergy sexual abuse on church structure). The church hierarchy places a premium on protecting its priests. See Smith, *supra* note 2, at 409–10 (noting that, though it is natural for people to feel outrage toward pedophiles, church does not react with similar outrage when abuser is priest).

153. See Doyle & Rubino, *supra* note 8, at 558. (classifying church structure as “monarchical”).

154. See *id.* (identifying pope’s role in hierarchy).

155. See *id.* (describing manner by which bishops attain power in church hierarchy).

156. See *id.* (identifying bishops’ power base); see also *Lothstein Interview*, *supra* note 149 (quoting National Review Board member, who characterized geographic divisions as “fiefdoms” controlled by bishops).

157. See Doyle & Rubino, *supra* note 8, at 558, 601–02 (explaining that both pope and bishops enjoy nearly absolute power with minimal oversight).

158. *Id.*

159. See *id.* (contrasting pope’s power to that of bishops). *But cf.* John H. Garvey, *The Pope’s Submarine*, 30 SAN DIEGO L. REV. 849, 858–59 (1993) (noting that there are some limits to hierarchal dominance).

[T]hough there is no denying the hierarchical structure of the Catholic Church, it is a mistake to suppose that all teaching authority operates from the top down. The Church’s bishops are not by training or occupation its best informed members on questions of politics, science, social science, or even theology. The laity are expected to make practical, prophetic, and scholarly contributions.

Id. (describing expectation of laity contribution to church).

160. See Garvey, *supra* note 159, at 858–59 (discussing problem with hierarchical structure); see also *Lothstein Interview*, *supra* note 149 (noting that those at top of hierarchy, including bishops, “evoke a role of invincibility, invulnerability, omniscience and omnipotence”). Members of the National Review Board, formed by the United States Conference of Catholic Bishops in response to the clergy abuse scandal, learned much about the church hierarchy and its power dynamics. See Jason Berry, *Board Got Rare Look at Hierarchical Ways*, NAT’L CATHOLIC REP. (Mar. 12, 2004), available at http://natcath.org/NCR_Online/archives2/2004a/031204/031204c.htm (discussing hierarchy and church resistance to changing status quo). One member emphasized the lack of communication among dioceses and between bishops and the Vatican. See *id.* (quoting National Review Board member, Leon Panetta).

tem is divinely inspired and constructed.”¹⁶¹ The consequence of the church structure is that it has empowered bishops to address clergy sexual abuse in a manner inconsistent with canon law.¹⁶²

The Code of Canon Law directly addresses clergy sexual abuse.¹⁶³ Canon 1395.2 states:

If a cleric has otherwise committed an offense against the sixth commandment of the Decalogue with force or threats or publicly or with a minor below the age of sixteen, the cleric is to be punished with just penalties, including dismissal from the clerical state if the case warrants it.¹⁶⁴

In addition to constituting a violation of Canon 1395.2, clergy that engage in sexual acts with minors also violate Canons 227 and 1389.¹⁶⁵ Following

161. See Doyle & Rubino, *supra* note 8, at 598 (“The basic claim of the divine origin of episcopal power is defended through authentication by interpretations of scripture and events in Church history.”); Garvey, *supra* note 159, at 858 (explaining that Catholic laity shares the belief that bishops have direct connection with God); see also Doyle & Rubino, *supra* note 8, at 588 (discussing bishops’ self-identities in context of their responses to clergy sexual abuse). Victims of abuse have criticized bishops of preserving church stability at the exclusion of addressing clergy sexual abuse allegations. See Doyle & Rubino, *supra* note 8, at 588 (noting victims’ concerns that bishops ignore clergy sexual abuse accusations).

162. See Doyle & Rubino, *supra* note 8, at 558–59 (“Although the mandate for a structured and documented investigation into allegations of sexual abuse by the clergy is unequivocal, diocesan bishops have customarily handled such reports in a much more informal manner, relying on their unquestioned status to do so.”); see also Coughlin, *supra* note 2, at 984–92 (discussing bishops’ failure to follow canon law). See generally *id.* at 992–96 (describing consequences of deviating from canon law).

163. See Doyle & Rubino, *supra* note 8, at 555 (explaining that canon law specifies procedures to address clergy sexual abuse). Canon law addressing clergy sexual misconduct has existed since the Code of Canon Law was first codified in 1917. See Coughlin, *supra* note 2, at 977 (remarking that canon law addressing clergy sexual abuse has existed for long period); Doyle & Rubino, *supra* note 8, at 574 (tracing origin of canon law relating to sexual misconduct by clerics).

164. 1983 CODE c.1395, § 2. See generally Msgr. John A. Alesandro, *A Study of Canon Law: Dismissal From the Clerical State in Cases of Sexual Misconduct*, 36 CATH. LAW 257, 270–73 (1996) (discussing elements and application of Canon 1395). Violation of Canon 1395 is “one of four classifications of sexual offenses for which a man may be permanently removed from the clerical state.” Coughlin, *supra* note 2, at 980. It is one of the most severe penalties in canon law. See *id.* (illustrating gravity of offense within canon law).

165. See Doyle & Rubino, *supra* note 8, at 556 (acknowledging that sexual abuse of minors violates several canons in 1983 Code). Canon 227 addresses violations of celibacy. See 1983 CODE c.277, § 1 (providing rules relating to celibacy). It states:

Clerics are obliged to observe perfect and perpetual continence for the sake of the Kingdom of heaven, and are therefore bound to celibacy. Celibacy is a special gift of God by which sacred ministers can more easily remain close to Christ with an undivided heart, and can dedicate themselves more freely to the service of God and their neighbor.

Id. (explaining requirement and purpose of celibacy). Canon 1389 addresses abuse of “ecclesiastical power.” See 1983 CODE c.1389, § 1. It states that “[o]ne

allegations that a cleric has violated one of the above-mentioned canons, bishops must follow procedures outlined in the Code.¹⁶⁶ The Holy See may impose penal sanctions on bishops failing to do so.¹⁶⁷

Despite the thorough treatment of clergy sexual abuse in the Code, bishops have underutilized the processes outlined within it.¹⁶⁸ The hierarchical structure has allowed this result because bishops operate virtually unchecked.¹⁶⁹ Rather than use the proscribed penalties, “bishops opted for a therapeutic approach to the exclusion of correcting the grave injury [of clergy sexual abuse] through the rule of canon law.”¹⁷⁰ Many bishops

who abuses ecclesiastical power or function is to be punished in accord with the seriousness of the act or omission not excluding deprivation from office unless a penalty for such abuse has already been established by a law or a precept.” *Id.*

166. See Coughlin, *supra* note 2, at 980–81 (discussing investigatory and judicial prongs of procedures outlined in 1983 Code); Doyle & Rubino, *supra* note 8, at 556–58 (detailing procedural requirements for investigation and judicial proceedings). After receiving “facially valid” information about sexual abuse, which may include “rumor[s], hearsay, and anonymous sources,” bishops must investigate. See *id.* at 556–57 (likening investigatory process to “a common law grand jury”). During this process, bishops must document their actions and findings. See *id.* (describing administrative requirements). If, following the investigation, judicial proceedings are warranted, a panel of three “collegiate judges” will conduct the proceedings. See Alesandro, *supra* note 164, at 284 (discussing judicial proceedings); Doyle & Rubino, *supra* note 8, at 556–57 (same). In some instances of “clear or notorious cases, however, permanent dismissal may be imposed on a guilty cleric through a simple administrative procedure.” Coughlin, *supra* note 2, at 981.

167. See Coughlin, *supra* note 2, at 980 (describing penalty bishops face when failing to utilize applicable canon law). The Holy See governs Vatican City. See CIA, WORLD FACTBOOK, *Holy See (Vatican City)* (Nov. 18, 2004), available at <http://www.cia.gov/cia/publications/factbook/geos/vt.html> (providing facts about Holy See). The Holy See sets the Vatican’s foreign policy and “cultivates relations between individual States and the Church.” See Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U. J. INT’L L. & POL’Y 629, 672 (1997) (describing function of Holy See).

168. See Alesandro, *supra* note 164, at 258 (“Most bishops have been loath to invoke the process in the Code of Canon Law for the punitive dismissal of the priest from the clerical state.”); Doyle & Rubino, *supra* note 8, at 558 (noting that, despite its existence, canon law addressing clergy sexual abuse “has rarely been utilized”); see also Coughlin, *supra* note 2, at 978 (stating that “many—and perhaps most—bishops declined to implement and enforce the rule of canon law”).

169. See Doyle & Rubino, *supra* note 8, at 558 (discussing lack of limitations on bishops’ power). Cardinal Bernard Law’s transfer of abusive priest John Geoghan among church parishes illustrates the discretion afforded to bishops in addressing clergy sexual abuse. For a discussion of Cardinal Law’s response to allegations that Father John Geoghan sexually abused minors, see *supra* notes 14–16 and accompanying text.

170. Coughlin, *supra* note 2, at 986 (describing response that was contrary to canon law); see Goodstein, *supra* note 2, at 1 (discussing use of treatment centers and their inefficiencies). But see Doyle & Rubino, *supra* note 8, at 587 (contending that bishops viewed sexual abuse as “moral failing” rather than psychological impairment).

sent abusive priests to treatment centers.¹⁷¹ These bishops sometimes enabled the abusive priests to return to their ministries following ineffective treatment.¹⁷² They did not, however, consistently disclose the priests' previous abuse.¹⁷³

2. *Internal Discipline Structure of the Catholic Church*

While the church hierarchical structure contributed to the extent of the sexual abuse scandal, the church preference for internal discipline had a similarly detrimental effect.¹⁷⁴ The church handled allegations of

171. See Coughlin, *supra* note 2, at 986–87 (describing influence of therapeutic approach on bishops' responses to clergy sexual abuse). Bishops' preference for therapeutic treatment was not malicious. See *id.* at 987 (same). In fact, it was consistent with "a general trend" in the 1970s and 1980s. See *id.* (same). Psychologists at that time believed that reform was possible through treatment. See *id.* (same). Furthermore, bishops' use of psychological treatment probably comported with the advice of lawyers. See *id.* (same). Unfortunately, treatment did not sufficiently cure "true pedophiles who commit serial sexual abuse." *Id.* In 2002, bishops responded to the abuse scandal by discarding the therapeutic approach to clergy sexual abuse. See *id.* at 990 (chronicling reform approach taken by bishops following their realization that therapeutic approach was not solving crisis). They "elected to correct the decades-long absence of canonical response with a rule of strict criminal liability." *Id.*

172. See Doyle & Rubino, *supra* note 8, at 572 (discussing bishops' responses to psychologists' recommendations). Church-affiliated treatment centers, frequently used to help sexually abusive clerics, were largely ineffective. See *id.* at 570–71 (explaining that clergy approach to sexual dysfunction was no different, and no more successful, than approach used in middle ages). For example, the Paraclete Fathers' program, located in Minnesota, did not isolate sufficiently abusive priests from parishioners. See *id.* (criticizing treatment center's policy, which permitted priests to work at church parishes on weekends). More importantly, bishops did not consistently abide by psychologists' recommendations following a priest's treatment. See *id.* at 572 (noting that bishops allowed priests to return to parishes because they both misconstrued and ignored psychologists' recommendations). The director of psychology at the Institute of Living, a facility that has treated sexually abusive priests, recommends that these priests continue receiving treatment during their lives and do not return to active ministry. See Lothstein Interview, *supra* note 149 (expressing frustration with bishops' decision to return abusive priests to ministry).

173. See Doyle & Rubino, *supra* note 8, at 572 (discussing bishops' secrecy). James Gill, Jesuit priest and psychologist, rationalized bishops' nondisclosure of past abuse by explaining, "the Catholic Church, a secretive organization by nature, [was] unaccustomed to the full disclosure required in treatment centers." *Id.* Still, revelations about previous nondisclosure bred even more hostility among those criticizing the transfer of abusive priests to new parishes. See O'Reilly & Strasser, *supra* note 4, at 33 (describing reactions of church critics to bishops' nondisclosure).

174. See Carmella, *supra* note 3, at 1032 (noting church's treatment of clergy sexual abuse as "internal personnel matters" made it unable to properly address crisis); see also Logan, *supra* note 110, at 321 ("[T]he Catholic Church itself, rather than acting decisively to end the victimizations and facilitate prosecutions, had engaged in a systematic effort to shield predator priests dating back several decades."); Lothstein Interview, *supra* note 149 (expressing dissatisfaction with internal discipline structure).

clergy sexual abuse internally, excluding civil authorities.¹⁷⁵ There is speculation as to why the church chose to do so.¹⁷⁶ The church may have believed its discipline policies were adequate.¹⁷⁷ The policies were not, however, utilized.¹⁷⁸ Another, more cynical possibility is that the church wished to keep private “potentially damaging internal documents.”¹⁷⁹ Regardless of the reason for the disposition to internal policing of its own, the historic role of “sanctuary” supplements an understanding of the church’s treatment of abusive clergy.¹⁸⁰

For hundreds of years, Christian churches provided sanctuary from criminal liability.¹⁸¹ Almost all criminals could obtain protection and, “[i]f sanctuary were successfully secured, the church would not surrender the beneficiary unless the party seeking custody would attest that the al-

175. See Doyle & Rubino, *supra* note 8, at 587 (remarking that bishops failed to contact civil authorities even if reporting statutes required them to do so); Logan, *supra* note 110, at 332 (describing instances in which bishops protected abusive priests from civil authorities). The practice of protecting abusive clergy from civil authorities is now changing. See *id.* at 334 (describing recent church acquiescence). The church has recently “bowed to public pressure and grudgingly disclosed the names of priests accused of sexual abuse over the decades.” *Id.* (same).

176. See Logan, *supra* note 110, at 335 (considering possible reasons why church favored internal discipline that permitted abuse to continue).

177. See *id.* (offering “benign explanation” for church’s actions). Church perceptions about the character of abusive priests may have increased its confidence in the internal discipline structure. See Goodstein, *supra* note 2, at 1 (explaining that clergy regarded sexual abusers as sinners rather than criminals).

178. For a discussion of the bishops’ failure to address clergy sexual abuse in accordance with canon law, see *supra* notes 168–73 and accompanying text.

179. See Logan, *supra* note 110, at 335 (suggesting “less benign” reason for church’s actions). Hiding harmful documents may have been an aspect of the church’s “damage control.” See *id.* (discussing explanations for church’s willingness to protect abusive priests). Bishops purposely purged priests’ files to prevent use of the files in lawsuits. See Smith, *supra* note 2, at 412 (quoting Aric Press et al., *Priests and Abuse*, NEWSWEEK, Aug. 16, 1993, at 42–43).

180. See Logan, *supra* note 110, at 330–36 (discussing elements of sanctuary in bishops’ response to clergy sexual abuse). “[T]here is no mistaking the vestiges of sanctuary in the [c]hurch’s response to allegations of abuse by its priests, euphemistically referred to as being ‘in between assignments.’” *Id.* at 336. Despite warnings in 1985 that clergy sexual abuse had become a widespread problem in the church, church officials failed to take permanent actions against abusive priests. See *id.* (commenting on church response to warnings by 1985 internal oversight board). Instead, the church sent the priests for treatment and later returned them to new parish assignments. See *id.* (noting that warnings of clergy abuse did not lead to changes in church structures or reports to civil authorities).

181. See *id.* at 323–24 (describing long history of sanctuary in church). Although the church developed sanctuary “to extend protection to the innocent maliciously pursued, to the injured, to the oppressed, and the unfortunate . . . [in time it] was so much extended that the most atrocious and guilty of malefactors could be found enjoying immunity within sacred walls and bidding defiance to the civil power.” *Id.* at 325 (quoting NORMAN MACLAREN TRENHOLME, *THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY* 9 (1903)).

leged wrongdoer would remain free from immediate harm.”¹⁸² Sanctuary steadily declined, however, in the seventeenth century.¹⁸³

Despite the demise of official sanctuary, the clergy abuse scandal has revealed that “the Church proved remarkably effective in affording sanctuary to abusive priests since the early 1960s.”¹⁸⁴ The practice of transferring previously abusive priests to new parishes is illustrative of that sanctuary.¹⁸⁵ For example, the church protected Father John Geoghan and Father Paul Shanley, both of whom were accused of sexually abusing minors.¹⁸⁶ Rather than alerting civil authorities, the church transferred the men to various parishes for almost three decades.¹⁸⁷ Both continued their patterns of abuse, victimizing more minors at each subsequent parish.¹⁸⁸ The church’s internal response, then, permitted clergy sexual abuse in these circumstances to continue.¹⁸⁹

3. *Recent Changes in Church Structure and Policy*

Recently, the church responded proactively to the institutional causes of clergy sexual abuse.¹⁹⁰ At its summer 2002 meeting in Dallas, Texas,

182. *Id.* at 325. In England, church sanctuary protected approximately one thousand people a year. *See id.* at 329 (explaining pervasiveness of sanctuary).

183. *See id.* at 329 (explaining reasons for demise of sanctuary). Sanctuary diminished as judicial processes became more fair and effective. *See id.* (explaining that sanctuary protected accused from “immediate blood revenge”). Additionally, the state wished to exert control over the fraudulent debtors and “political enemies of the King” who had taken advantage of church sanctuary. *See id.* (explaining that use of sanctuary by these individuals contributed to demise of sanctuary).

184. *See id.* at 331 (discussing role played by church in shielding abusive priests from legal punishment).

185. *See id.* at 332 (discussing transfer of two abusive priests to illustrate vestiges of sanctuary in church’s actions).

186. *See id.* (specifying instances where church protected known sexual pedophiles); *see also* Frank Bruni, *Crime and Punishment; Prosecuting the Church*, N.Y. TIMES, Apr. 14, 2002, at 4 (discussing church’s knowledge of Shanley’s abuse and his subsequent transfers); Rezendes, *supra* note 14, at A1 (tracing Geoghan’s abusive history). For a discussion of Geoghan’s abusive behavior and his transfer to multiple parishes, *see supra* notes 14–16 and accompanying text.

187. *See* Logan, *supra* note 110, at 332 (explaining manner in which church protected Geoghan and Shanley); Bruni, *supra* note 186, at 4 (discussing Shanley’s transfer to California and Manhattan Catholic guest houses despite knowledge of sexual abuse allegations against Shanley); Rezendes, *supra* note 14, at A1 (discussing Geoghan’s various reassignments).

188. *See* Logan, *supra* note 110, at 332 (noting that transferring Geoghan and Shanley did not stop cycle of abuse); Rezendes, *supra* note 14, at A1 (describing Geoghan’s pattern of sexual abuse).

189. *See* Logan, *supra* note 110, at 335 (expressing opinion that protection of abusive priests contributed to continuation of clergy sexual abuse); *see also* McNamara, *supra* note 13, at B1 (characterizing church response to clergy sexual abuse as “most obvious sign of institutional dysfunction”).

190. *See* Logan, *supra* note 110, at 336 (explaining that church reevaluated its response to clergy sexual abuse at June 2002 meeting of UCCB); *Charter*, *supra* note 138 (altering church practices in response to clergy sexual abuse of minors).

the UCCB adopted the Charter for the Protection of Children & Young People ("Charter").¹⁹¹ In the Charter's Preamble, the bishops acknowledged the "crisis" in the church and accepted responsibility for their role in the scandal.¹⁹² Moreover, the bishops addressed the veil of secrecy that previously shrouded clergy sexual abuse and expressed a preference for openness.¹⁹³ To counteract past ills, the Charter established new policies to address abuse in the church.¹⁹⁴

The Vatican responded negatively to policies established by the Charter.¹⁹⁵ The UCCB considered the Vatican's concerns and responded by

191. See *Charter*, *supra* note 138 (establishing new church procedures to respond to clergy sexual abuse of minors); see also Logan, *supra* note 110, at 336 (describing institutional changes proposed by Charter); O'Brien, *supra* note 2, at 371-72 (describing UCCB meeting and characterizing adoption of Charter as response to "American model of accountability, repentance, and restitution").

192. See *Charter*, *supra* note 138 ("As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past.").

193. See *id.* (acknowledging secrecy in Preamble and incorporating policy of openness in Article 7). The Charter addresses the church's historical preference for secrecy by requiring openness with law enforcement and the community at large. See *id.* (announcing new church procedures in recognition of current clergy sexual abuse crisis). Dioceses must report allegations of clergy sexual abuse of minors to public authorities. See *id.* (same). This policy change could help dioceses reduce the financial strain created by the clergy sexual abuse scandal because, by reporting sexual abuse to civil authorities, the dioceses' liability will decrease or be eliminated. See Smith, *supra* note 2, at 418 (discussing advantages of reporting priests' abuse). In addition to requiring reports to civil authorities, the Charter prohibits confidentiality agreements except in extenuating circumstances. See *Charter*, *supra* note 138 (announcing new church procedures). Furthermore, each diocese must "develop a communications policy that reflects a commitment to transparency and openness." *Id.*

194. See *Charter*, *supra* note 138 (enumerating new policies to address clergy sexual abuse). The Charter instituted procedures to promote healing, to ensure effective responses, to promote accountability and to prevent future abuse. See *id.* (same). To facilitate its goals, the Charter built a multi-layer hierarchy of oversight entities. See *id.* (same). First, it required that dioceses have review boards comprised mainly of laypeople who "advise [the dioceses' bishops] in [their] assessment of allegations of sexual abuse." See *id.* (same). Second, to ensure uniform compliance with procedures, the Charter created the Office for Child and Youth Protection to aid dioceses in their implementation of Charter programs. See *id.* (same). Finally, the Charter required a National Review Board to monitor the Office of Child and Youth Protection. See *id.* (same). Its envisioned responsibilities include approving recommendations and commissioning a study to enable a clearer understanding of clergy sexual abuse. See *id.* (same).

195. See Logan, *supra* note 110, at 337 (discussing Vatican's disagreement with Charter's "zero tolerance" policy and mandatory reporting to civil authorities); see also Frank Bruni, *The Vatican Is Rejecting an Erosion of Authority*, N.Y. TIMES, Oct. 20, 2002, at A1 (explaining that Vatican's negative response stemmed from concerns that Charter opened church to oversight by laypeople disconnected with church hierarchy). The Vatican expressed concerns that the Charter's "zero tolerance" policy did not comport with "[c]hurch notions of due process and fairness." *Id.* The Vatican disagreed with the mandatory reporting requirement because it would threaten the bishop-priest relationship. See *id.* (explaining Vatican's concern that distrustful relationship would develop between bishops and priests).

developing the Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons (“Norms”).¹⁹⁶ The Norms softened the Charter’s “zero tolerance” policy, which required the removal of priests when there are credible accusations of sexual abuse of minors.¹⁹⁷ Under the Norms, priests found guilty of sexually abusing minors will lose ministerial authority but will not automatically be dismissed from the clerical state.¹⁹⁸ Additionally, the Norms altered the Charter’s requirement that bishops report all sexual abuse of minors to civil authorities.¹⁹⁹ Under the Norms, bishops must only report to civil authorities when civil law in that jurisdiction requires them to do so.²⁰⁰

While the Charter and Norms are positive steps in addressing the problem of clergy sexual abuse, reporting patterns of clergy sexual abuse victims suggest that revelations of pre-Charter/Norms abuse will continue

196. See U.S. CONFERENCE OF CATHOLIC BISHOPS, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (Dec. 8, 2002) [hereinafter *Norms*], available at <http://www.usccb.org/ocyp/norms.htm> (decreeing norms for diocese/eparchies to aid them in addressing allegations of clergy sexual abuse of minors); see also Ladislav Orsy, *Bishops’ Norms: Commentary and Evaluation*, 44 B.C. L. REV. 999, 999 (2003) (critically analyzing Norms). The Norms apply to Catholic bishops in the United States. See U.S. CONFERENCE OF CATHOLIC BISHOPS, OFFICE OF CHILD AND YOUTH PROTECTION, *FAQs*, available at www.usccb.org/ocyp/faqs.htm (last visited Nov. 24, 2004) (explaining force of Norms). Bishops who do not comply with the Norms face canonical penalty. See *id.* (noting that Norms have greater force of law than does Charter because Norms are “particular” canon law: canon law applicable to specified group).

197. See Logan, *supra* note 110, at 337 (explaining differences between Charter and Norms).

198. See *Norms*, *supra* note 196 (explaining that priest must “lead a life of prayer and penance” if not dismissed from clerical state).

199. See Logan, *supra* note 110, at 338 (explaining differences in reporting requirements between Charter and Norms). Compare Charter, *supra* note 138 (“Dioceses/eparchies will report an allegation of sexual abuse of a person who is a minor to the public authorities.”), with *Norms*, *supra* note 196 (“The diocese/eparchy will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation.”).

200. See *Norms*, *supra* note 196 (softening reporting requirement of Charter). Victims’ groups were displeased with the Norms. See Logan, *supra* note 110, at 338 (remarking that victims’ displeasure was not surprising). They viewed the Norms as “considerably less ambitious” than the Charter. See *id.* (describing victims’ groups preference for Charter over Norms). The groups expressed concerns that the changes did not effectively address secrecy or the church’s power of discretion. See *id.* (explaining victims’ criticism of Norms).

in the coming years.²⁰¹ Victims often delay in reporting abuse.²⁰² Therefore, the church's institutional changes do not negate the need to reexamine charitable immunity.²⁰³

C. Financial Reality

In response to allegations of clergy sexual abuse, many dioceses across the country have entered into settlement agreements with victims.²⁰⁴ The settlements are admirable because they provide expedited compensation.²⁰⁵ The choice to settle claims with victims, however, has not come

201. See Doyle & Rubino, *supra* note 8, at 607 (noting that adults brought many clergy sexual abuse actions against church, alleging they were victims of sexual abuse as minors). The emotional trauma, unique to clergy sexual abuse, is one explanation for the delayed reporting. See *id.* (offering potential reason for delayed reporting of clergy sexual abuse). "The victims are mentally and emotionally impeded to such a profound degree, that they are unable to come forward because of the overpowering experience with the cleric." *Id.*; see also Smith, *supra* note 2, at 413 (explaining that victims of clergy sexual abuse often delay revealing abuse because it may destroy their "belief system").

202. See Doyle & Rubino, *supra* note 8, at 607 (discussing delayed reports of clergy sexual abuse). Many clergy sexual abuse victims do not bring actions against the church until they reach adulthood. See Goodstein, *supra* note 2, at 1 (quoting physician who treated abuse victims and noting that many victims do not report abuse until their mid-20s). This phenomenon is common to sexual abuse of minors in general. See David McCord, *Criminal Law: Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 61 (1986) (explaining that experts acknowledge "that it is not unusual for a child to delay in reporting sexual abuse"). Delayed reporting presents a problem in some states because statutes of limitations may preclude litigation. See Schiltz, *supra* note 4, at 954 (commenting on states' statutes of limitation). Many states, however, have adopted a delayed discovery rule. See *id.* (explaining attempts of many states to alleviate statute of limitations problems for victims who bring allegations of abuse many years after incident). Under a delayed discovery rule, the statute of limitation is triggered only when "the victim knows or reasonably should know, that [he or] she has been injured by sexual abuse." See *id.* (discussing delayed discovery rule).

203. For a discussion of amendments to the Charitable Immunity Act, proposed since adoption of the Charter and Norms, see *supra* note 74 and accompanying text.

204. See O'Reilly & Strasser, *supra* note 4, at 37 (characterizing expenses for lawsuits or settlements as theme in clergy sexual abuse scandal); Schiltz, *supra* note 4, at 951 (noting that high cost of settlements are consequence of clergy sexual abuse litigation); Rita Giolli, *Still Waiting for Judgment Day*, NEWSDAY, Oct. 26, 2003, at A03 (observing that many dioceses across country have chosen to settle clergy sexual abuse claims with victims). Due to confidentiality agreements entered into by the church prior to "official court filings," it is impossible to know the exact amount the church has paid in civil settlements to date. See Logan, *supra* note 110, at 332-33 (discussing costs church has incurred in protection of abusive priests).

205. See Wells, *supra* note 2, at 1227 (advocating settlements because they compensate victims quicker than legal system). But see Mark A. Sargent, *Legal Defense: When Sued, How Should the Church Behave?*, VILL. MAG. (2002), available at <http://www.publicrelations.villanova.edu/magazine/archives/summer2002/legal.defense.htm> ("Even the mere attempt to negotiate the amount of a cash settlement to a lower level than that demanded by the plaintiff may be thought of as a

without a price.²⁰⁶ Settlement costs are extremely high and have crippled some dioceses.²⁰⁷

Although the Charitable Immunity Act shields New Jersey dioceses from tort liability arising out of clergy sexual abuse, the dioceses have nevertheless chosen to enter into settlement agreements, which have drained large sums from their funds.²⁰⁸ New Jersey dioceses reported their settlement costs as part of the survey commissioned by the UCCB.²⁰⁹ The Paterson Diocese reported paying \$2.8 million in settlements and legal

nasty lawyerly trick reflecting the church's basic unwillingness to accept its responsibilities.").

206. See O'Reilly & Strasser, *supra* note 4, at 37 (explaining that treating victims of abuse is expensive component of settlements); Schiltz, *supra* note 4, at 951 (noting that churches must expend "hundreds of millions of dollars" in legal fees and settlements); see also *John Jay Study*, *supra* note 137 (providing statistical data about cost to church of clergy sexual abuse). In many states, dioceses have paid multi-million dollar settlements. See Epstein, *supra* note 11, at 416–17 (listing settlement amounts for various dioceses). In 2002, for example, the Diocese of Tucson, Arizona, settled eleven lawsuits for close to \$15 million. See *id.* (highlighting settlement figures for particular dioceses). In 2003, the Archdiocese of Louisville, Kentucky entered into a settlement for \$25.7 million, and the Archdiocese of Seattle, Washington agreed to settle 15 lawsuits for \$7.87 million. See *id.* (same).

The survey commissioned by the UCCB revealed the total cost of clergy sexual abuse on dioceses between 1950 and 2002. See *John Jay Study*, *supra* note 137 (providing statistical data about cost of clergy sexual abuse scandal). Excluding the \$85 million settlement recently entered into by the Boston Archdiocese, the nation's dioceses have expended \$499,582,192.35. See *id.* (same). This figure includes victim compensation and treatment, priest treatment and attorney fees. See *id.* (explaining cost components considered in study). It excludes the amount covered by insurance. See *id.* (same). Victim compensation and treatment combined cost dioceses a total of \$439,941,289.59. See *id.* (reporting costs minus attorneys' fees awarded).

207. See Epstein, *supra* note 11, at 416 (stating that average settlements in United States reached \$1 million by early 1990s); Mickey Ciokajlo, *Church Pays \$4 Million to 4 for Abuse; Archdiocese Selling Land to Raise Money*, CHI. TRIB., July 10, 2003, at 1 (discussing consequences of high settlement costs for Archdiocese of Chicago); Editorial, *Room for Boston College*, BOSTON GLOBE, Apr. 23, 2004, at A22 (discussing Boston Archdiocese's decision to sell property to pay for recent \$85 million settlement). Large settlements have led dioceses to sell real estate and reduce services offered to parish members. See Epstein, *supra* note 11, at 417 (noting that Diocese of Dallas sold property to pay for 1997 settlement); Ciokajlo, *supra* (reporting that Archdiocese of Chicago has sold real estate and closed schools to address its debt); *Room for Boston College*, *supra* (discussing Boston Archdiocese's sale of "the archdiocesan complex in Brighton" to Boston College).

208. See Chadwick, *supra* note 7, at A01 (noting that Charitable Immunity Act has not prevented New Jersey dioceses from paying large settlements to victims of clergy sexual abuse).

209. See generally *In Paterson Diocese, 4% Were Accused of Sex Abuse; Church Report Serves as a Start for Dialogue*, DAILY REC. (MORRISTOWN, N.J.), Feb. 28, 2004, at 1A [hereinafter *Paterson Diocese*] (explaining reason for dioceses' disclosure). In addition to reporting information about clergy sexual abuse to the UCCB, dioceses also informed their parishioners of the statistics. See *id.* (noting that dioceses distributed church-run newspapers with clergy abuse statistics to parishioners).

fees.²¹⁰ The Camden Diocese paid more than twice that amount—\$5.7 million.²¹¹ Combined, New Jersey's five dioceses have paid \$12.8 million in settlements and counseling for victims of clergy sexual abuse.²¹²

New Jersey dioceses offer various explanations for their willingness to settle clergy sexual abuse cases in spite of the Charitable Immunity Act.²¹³ First, some believe settlements to be the "best option" because the lawsuits often include many plaintiffs.²¹⁴ Second, diocesan officials cite "a loophole in the law [since corrected] that made them uncomfortable with using [charitable immunity] as a defense in every case."²¹⁵ Finally, settlements may be beneficial because they allow a more expeditious recovery for victims.²¹⁶ The Camden Diocese, in particular, expressed this sentiment.²¹⁷ In a statement released by the Diocese of Camden following a settlement with twenty-three plaintiffs, Bishop Nicholas DiMarzio ex-

210. *See id.* (discussing statistics reported by Paterson Diocese). The Paterson Diocese is comprised of three counties: Morris, Sussex and Passaic. *See id.* (describing geographic area within Paterson Diocese). Over the past fifty years, the diocese has had credible accusations of sexual abuse relating to thirty priests and one deacon. *See id.* (discussing prevalence of abuse in Paterson Diocese). Out of New Jersey's five dioceses—Paterson, Camden, Metuchen, Trenton and the Archdiocese of Newark—the Paterson Diocese had the highest percentage of priests accused of sexual abuse. *See id.* (comparing abuse allegations among New Jersey dioceses).

211. *See id.* (providing results of church-initiated review that tabulated amounts paid in settlements and fees by various dioceses in New Jersey). Compared to the five New Jersey dioceses, Camden paid the most in settlement and counseling costs. *See id.* (same). The Camden Diocese received media attention in 2003 for a \$880,000 settlement with twenty-three plaintiffs. *See id.* (describing high-profile New Jersey clergy sexual abuse action). The plaintiffs in that litigation alleged abuse occurring between the 1960s and 1980s. *See id.* (same).

212. *See id.* (reporting aggregated costs for all New Jersey dioceses). The \$12.8 million paid by New Jersey dioceses contributes to the \$772 million total spent by Roman Catholic dioceses nationwide in addressing the clergy sexual abuse scandal. *See* Cathy Lynn Grossman & Anthony DeBarros, *Church Struggles with Change*, USA TODAY, Nov. 8, 2004, at 1D (reporting total amount spent by church in scandal to date).

213. *See* Chadwick, *supra* note 7, at A01 (reporting two reasons diocesan officials provided for entering into settlement agreements: large number of plaintiffs and previous loophole in statute that made officials hesitant to use statute's protection); *see also* DIOCESE OF CAMDEN, *Settlement Reached in Sexual Abuse Case* (Mar. 13, 2003) [hereinafter *Camden Settlement*], at <http://www.camdendiocese.org/pdf/statement.FINAL.pdf> (expressing hope that settlements aid victims in recovery).

214. *See* Chadwick, *supra* note 7, at A01 (identifying one reason given by dioceses for settling).

215. *Id.* Until a 1995 amendment to the Charitable Immunity Act altered the statute, victims could not sue employees or volunteers who were grossly negligent. *See id.* (reiterating reasons given by diocese for not using Charitable Immunity Act as defense). This previous loophole made some officials hesitant to invoke the protection of the Act. *See id.* (same).

216. *See* Wells, *supra* note 2, at 1227 (praising settlements because they enable victims to avoid slow legal proceedings).

217. *See Camden Settlement*, *supra* note 213 (expressing hope that settlement with twenty-three plaintiffs will expedite healing process). In a statement released following the Camden Diocese's \$880,000 settlement with twenty-three alleged vic-

plained, "I am hopeful that this reconciliation will speed the process of healing for those who have been harmed in any way."²¹⁸

Diocesan decisions to settle clergy sexual abuse lawsuits may undermine the legislative intent of the Charitable Immunity Act.²¹⁹ The legislature reinstated charitable immunity in order to preserve the assets of charitable entities.²²⁰ Instead, settlements have depleted millions of dollars from New Jersey dioceses.²²¹ Although technically immune from liability arising out of negligent supervision or hiring, the church has compensated victims rather than rely on the protection of the Act.²²²

V. CONCLUSION

Since its dubious inception in this country, a majority of states have abolished the doctrine of charitable immunity.²²³ Specifically, the revelation that English courts rejected the doctrine, combined with evolving societal priorities, impacted state court decisions.²²⁴ New Jersey, however, has resisted the majority rule and has retained charitable immunity.²²⁵ The New Jersey Charitable Immunity Act provides nearly complete protection to charitable entities in tort actions arising out of negligence.²²⁶

tims of clergy abuse, the diocese's bishop expressed his hope that the settlement would expedite the victims' healing processes. *See id.* (same).

218. *Id.* The plaintiffs were not entirely pleased with the settlement entered into by the Diocese of Camden. *See* O'Reilly, *supra* note 3, at A01 (reporting Camden Diocese settlement). They had sought \$50 million from the diocese, but received only \$880,000. *See id.* (same). However, plaintiffs were pleased "they had succeeded in helping to expose clergy sex abuse." *See id.* (same).

219. *See* Chadwick, *supra* note 7, at A01 (noting that Charitable Immunity Act has not prevented New Jersey dioceses from paying large settlements to victims of clergy sexual abuse); *cf.* Schultz v. Roman Catholic Archdiocese, 472 A.2d 531, 537 (N.J. 1984) (citing *Exemption of Religious, Charitable and Hospital Organizations from Negligence Liability: Hearing on S. 204 Before the Assembly Judiciary Committee*, 1958 Leg., 188th Sess. (N.J. 1958)) (identifying economic concerns as focus of Charitable Immunity Act); Vitale Statement, *supra* note 22 (identifying original purpose of Charitable Immunity Act).

220. *See* Schultz, 472 A.2d at 537 (remarking that legislature emphasized economic consequences of abolishing charitable immunity).

221. *See* Paterson Diocese, *supra* note 209, at 1A (providing settlement figures for New Jersey dioceses). For a discussion of settlements entered into by the church in New Jersey, see *supra* notes 204–22 and accompanying text.

222. *See* Chadwick, *supra* note 7, at A01 (explaining that Charitable Immunity Act has not hindered New Jersey dioceses' willingness to settle claims for large sums).

223. *See* RESTATEMENT TORTS, *supra* note 4, § 895E cmt. d (commenting that majority of states have abolished charitable immunity); *see also* Chopko, *supra* note 4, at 1089–90 (remarking that almost all jurisdictions limit charitable immunity).

224. *See* Bottari, *supra* note 19, at 62–63 (explaining that rejection of doctrine stemmed both from revelation that English abolished charitable immunity and "evolving public needs").

225. *See* N.J. STAT. ANN. § 2A:53A-7 (West 2004) (providing charitable immunity to New Jersey nonprofit organizations).

226. *See id.* (enumerating parameters of charitable immunity in New Jersey). Employees of charitable organizations receive less protection—they are not immu-

Consideration of the Charitable Immunity Act in light of the clergy sexual abuse scandal has impacted the argument that the New Jersey legislature should amend the statute.²²⁷ Several aspects of the scandal are relevant to a critique of charitable immunity in clergy sexual abuse actions.²²⁸ First, clergy sexual abuse victims are distinguishable from the occasional victims of negligence the Act originally contemplated.²²⁹ Next, church hierarchal and internal discipline structures created an environment in which clergy members could continuously abuse minors under a veil of secrecy.²³⁰ The church did not intentionally seek to achieve this result.²³¹ The widespread nature of the abuse was the unfortunate consequence of mistakes the church admits to making.²³² Finally, the response of New Jersey dioceses to clergy sexual abuse litigation reveals that the Act is not serving its purpose, as originally contemplated by the legislature.²³³ The legislature revived charitable immunity in New Jersey to preserve charitable funds.²³⁴ Yet, New Jersey dioceses have repeatedly settled actions

nized from liability arising out of gross negligence. For a discussion of the distinction between the immunity afforded to employees and charitable organizations, see *supra* note 7 and accompanying text.

227. See Chadwick, *supra* note 7, at A01 (“In the wake of the crisis in the Catholic Church, the [New Jersey Charitable Immunity Act] has become the focal point in a battle for change.”). For a discussion of proposed amendments to the Charitable Immunity Act, see *supra* note 74 and accompanying text.

228. For a discussion of elements of the clergy sexual abuse scandal relevant to a critique of charitable immunity, which include the widespread nature of abuse, institutional concerns and the church’s propensity to settle clergy abuse claims, see *supra* notes 140–222 and accompanying text.

229. See *John Jay Study*, *supra* note 137 (providing statistical data relating to church clergy sexual abuse scandal); cf. Bottari, *supra* note 19, at 85 (commenting that New Jersey Charitable Immunity Act balances interest of charitable entity with “occasional victims” of negligence).

230. See Doyle & Rubino, *supra* note 8, at 615 (discussing impact of hierarchical structure on bishops’ responses to clergy sexual abuse); Logan, *supra* note 110, at 321 (discussing impact of church’s preference for internal disciplining of abusive clergy).

231. See Coughlin, *supra* note 2, at 977 (remarking that canon law addressing clergy sexual abuse has existed for long time); Doyle & Rubino, *supra* note 8, at 555 (explaining that canon law specifies procedures to address clergy sexual abuse).

232. See Doyle & Rubino, *supra* note 8, at 558, 587 (describing hierarchical structure and bishops’ response to clergy sexual abuse); Logan, *supra* note 110, at 332 (discussing internal discipline and practice of shielding priests from civil authorities); *Charter*, *supra* note 138 (“As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past.”).

233. See Chadwick, *supra* note 7, at A01 (explaining that Charitable Immunity Act has not hindered New Jersey dioceses’ willingness to settle claims for large sums).

234. See *Schultz v. Roman Catholic Archdiocese*, 472 A.2d 531, 537 (N.J. 1984) (citing *Exemption of Religious, Charitable and Hospital Organizations from Negligence Liability: Hearing on S. 204 Before the Assembly Judiciary Committee*, 1958 Leg., 188th Sess. (N.J. 1958)) (identifying economic concerns as focus of Charitable Im-

brought by plaintiffs.²³⁵ In doing so, the dioceses have expended millions of dollars from the church coffers.²³⁶

Because charitable immunity in clergy sexual abuse actions may not be appropriate or effective based on the number of victims, the church's role in the abuse and the propensity of state dioceses to settle claims, the New Jersey legislature should consider taking the suggestion offered in *Shultz*—reconsideration of the Act and its “application to new theories of liability.”²³⁷ The state legislature can alter the Charitable Immunity Act by carving out an exception to immunity where negligence has resulted in the sexual abuse of a minor.²³⁸ Church officials oppose this option because they fear “costly lawsuits” will result.²³⁹ Still, despite the protection offered by the Act, New Jersey dioceses have not avoided costly settlements.²⁴⁰

Until the legislature commits to changing the New Jersey Charitable Immunity Act, options for victims of clergy sexual abuse remain limited to collecting damages from the meager assets of their abusers.²⁴¹ Although state dioceses have proven willing to settle, victims are not guaranteed recovery because the church can effectively claim immunity.²⁴² Therefore,

munity Act); *Vitale Statement*, *supra* note 22 (identifying legislative concerns about proper use of charitable funds).

235. See Chadwick, *supra* note 7, at A01 (discussing New Jersey dioceses' willingness to settle clergy sexual abuse claims).

236. See *Paterson Diocese*, *supra* note 209, at 1A (reporting that New Jersey dioceses expended \$12.8 million in settlements and victims' counseling).

237. See *Schultz*, 472 A.2d at 539 (expressing opinion that charitable immunity may become inappropriate as new theories of liability develop).

238. See S. 540, 211th Leg., 2004–05 Sess. (N.J. 2004) (proposing amendment to New Jersey Charitable Immunity Act that would allow victims to sue charitable organizations where organizations' negligence allowed sexual abuse of minors to occur). For a discussion of proposed amendments to the Charitable Immunity Act, see *supra* note 74 and accompanying text.

239. See Chadwick, *supra* note 7, at A01 (noting that diocesan officials oppose amending Charitable Immunity Act because of potential costs and because they have already taken action to solve clergy sexual abuse crisis).

240. See *id.* (explaining that in spite of Charitable Immunity Act, New Jersey dioceses still enter into expensive settlement claims); *Paterson Diocese*, *supra* note 209, at 1A (reporting total amount expended by New Jersey dioceses for settlements and victims' counseling).

241. See Chopko, *supra* note 4, at 1090 n.1 (explaining that charitable beneficiaries cannot sue charitable entities under theory of negligence); see, e.g., *Schultz*, 472 A.2d at 536 (holding that Charitable Immunity Act precludes archdiocese liability in negligent hiring action stemming from clergy sexual abuse).

242. See Chadwick, *supra* note 7, at A01 (pointing out that, although New Jersey dioceses have settled claims, state courts continue to uphold charitable immunity, which prevents lawsuits against church from moving forward).

the Charitable Immunity Act exacerbates the harm inflicted by clergy sexual abuse.²⁴³

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243. *See id.* (recounting two-fold injury in *Schultz*). Christopher Schultz's brother, Richard, summed up the impact of the court's decision by explaining that "his family was destroyed [first] by his brother's [suicide] and then by the court's decision [to apply the Charitable Immunity Act]." *Id.*