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## **'Good God': How Civil Litigation Evolved to Hold Religious Entities Accountable for Clergy Sexual Abuse**

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## **I. INTRODUCTION**

The pervasiveness and frequency of clergy sexual abuse and its cover-up by Catholic Church officials, by all accounts, is an outrageous institutional failure. It has been called "the greatest scandal in the history of religion in America."<sup>1</sup> To its credit, the tort system has been rather successful at not only exposing the scandal to the public, but has also placed significant emphasis on institutional reform, and the need for leaders of churches to take action themselves, both preemptively and during new instances of abuse. By framing the problem of clergy sexual abuse as one of institutional failure, state, and federal courts have given notice to the Catholic Church, law enforcement, and state governments that the burden is on them to ensure their policies are aligned and functioning as the courts intend. While there are unquestionably instances of sexual misconduct outside of the Catholic Church, which will be briefly discussed below, the prevalence of clergy sexual abuse within the church and the role the institution took in covering-up instances of sexual misconduct necessitates a more in-depth analysis.

## **II. AN ABRIDGED OVERVIEW OF THE SCANDAL**

### **A. Development of National Concern and Reporting Laws**

For decades now, the Catholic Church sexual abuse crisis has been at the forefront of the news with new reports popping up as recently as last week from the time this was written.<sup>2</sup> However, prior to the mid-to-late 1970's, society, for the most part, believed child sexual abuse ("CSA") was exceptionally rare. Media reporting of CSA did not exist outside of maybe a purely local context, especially instances where the clergy was implicated, and there was no national

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<sup>1</sup> Rev. Andrew Greeley, *Foreword*, in Jason Berry, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (1992).

<sup>2</sup> See Vanessa Bignasca, et. al, *Wide Range of Cases of Sexual Abuse in the Context of the Catholic Church*, UNIV. OF ZURICH (Sept. 9, 2023), [www.news.uzh.ch/en/articles/media/2023/Sexual-Abuse](http://www.news.uzh.ch/en/articles/media/2023/Sexual-Abuse).

media coverage of the issue.<sup>3</sup> People were reluctant to speak about child abuse and neglect in general, let alone CSA, and as a result it remained taboo for public discourse. Child abuse and neglect encompasses numerous forms of maltreatment, CSA is a relatively small subset of abuse and neglect cases overall.<sup>4</sup> The nature of the abuse tends to attract significant attention when thrust into the public sphere, which has only really occurred over the past three decades.

Reports or studies on child abuse and neglect were virtually nonexistent.<sup>5</sup> Indeed, it was not until 1946 when the first study on child abuse, within U.S. medical literature, was conducted to document physical injuries upon children.<sup>6</sup> Prior to 1965, California was the only state where child abuse and neglect was expressly criminalized.<sup>7</sup> In response to both the growing public and professional concern that existing policies and procedures for reporting child abuse were insufficient, forty-four (44) states enacted mandatory reporting laws for physicians by 1968.<sup>8</sup> National concern became more prevalent in the 1970s, prompting the creation of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974 in conjunction with the National Center for Child

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<sup>3</sup> See Timothy D. Lytton, *Commentary: Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law* 39 CONN. L. REV. 809, 812 (2007).

<sup>4</sup> Approximately 9.6% of reported cases were CSA in 2021. Other kinds of maltreatment include neglect, medical neglect, physical abuse, and psychological maltreatment. U.S. Department of Health & Human Services: Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, 32 *Child Maltreatment* 2021 1, 104 (2023), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf>.

<sup>5</sup> Dr. Auguste Ambrose Tardieu wrote the first documented paper discussing CSA in 1857. Jean Labbé & Ambroise Tardieu, *The Man and His Work on Child Maltreatment a Century Before Kempe*, *Child Abuse & Neglect* 29(4) INT'L SOC'Y PREV. CHILD ABUSE & NEGLECT 311-324 (2005), <http://dx.doi.org/10.1016/j.chiabu.2005.03.002>.

<sup>6</sup> See Christopher Spencer Greeley, *The Evolution of the Child Maltreatment Literature* 130(2) AM. ACAD. PEDIATRICS 347-348 (August 2012), <https://doi.org/10.1542/peds.2012-1442>.

<sup>7</sup> See Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania* 59(6) VILL. L. REV. TOLLE LEGE 37, 38 (2014).

<sup>8</sup> United States Children's Bureau, *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* 1, 11-12 (1963), <https://hdl.handle.net/2027/pur1.32754078884032>. (“Physicians who become aware of such cases should report them to an appropriate police authority and protective services of the State...as a member of the staff of a hospital or similar institution he shall notify the person in charge of the institution or his designated delegate.”)

Abuse and Neglect.<sup>9</sup> Since the creation of CAPTA, reported child abuse cases have increased dramatically, while instances of abuse have dropped.<sup>10</sup> As well, the National Child Abuse Coalition was created in 1979 to help compel Congress to pass more CSA laws. Today, every state has sexual abuse laws and policies as well as mandatory reporting of child abuse and neglect.<sup>11</sup> Many governmental agencies also work with each other, individually, and/or with private entities to provide resources, including information on prevention, detection, and contacting the appropriate authorities, as well as publishing yearly reports on CSA.<sup>12</sup>

### **B. The Problem(s): Anyone Can be a Predator**

Stating that the abuse and neglect of minors, especially sexual abuse, is morally reprehensible is not really a belief that needs to be expounded upon.<sup>13</sup> Children are the most vulnerable, accessible and easily manipulable victims in society.<sup>14</sup> Unfortunately, CSA is almost always carried out by family members, teachers, doctors, coaches, and clergy—usually a guardian

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<sup>9</sup> U.S. Department of Health and Human Services, Children’s Bureau, *The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America’s Children* 40 NAT’L CHILD ABUSE & NEGLECT TRAINING AND PUBLICATIONS PROJECT 1, 6 (2014), (“In almost every community in the nation, there were inadequacies, breakdowns, and a lack of coordination in the child protection protective process.”)

<sup>10</sup> *Id.* at 6.

<sup>11</sup> 2021 data show professionals submit 67.0% of reports, legal and law enforcement personnel (21.8%), education personnel (15.4%), and medical personnel (12.2%). Nonprofessionals submit 17.1 percent of reports with the largest category being parents (6.5%), other relatives (6.2%). See U.S. Department of Health & Human Services, *supra*, note 4 at 9.

<sup>12</sup> *Id.*; see also U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1, 2 (2019), <https://www.childwelfare.gov/resources/clergy-mandatory-reporters-child-abuse-and-neglect/>. (At least 29 States and Guam require clergy among those professionals specifically mandated by law to report known or suspected instances of child abuse or neglect.)

<sup>13</sup> State of New Jersey: Department of Children and Families, *State of New Jersey: Defining Child Abuse and Neglect*, [www.nj.gov/dcf/reporting/defining/](http://www.nj.gov/dcf/reporting/defining/). (“Abuse is the physical, sexual or emotional harm or risk of harm to a child under the age of 18 caused by a parent or other person who acts as a caregiver for the child. Neglect occurs when a parent or caregiver fails to provide proper supervision for a child or adequate food, clothing, shelter, education, or medical care although financially able or assisted to do so.”)

<sup>14</sup> *Id.* (“Two-thirds of all victims of sexual assault reported to law enforcement agencies, were juveniles. More than half of all juvenile victims were under age 12.”)

or caregiver of some form to the victim.<sup>15</sup> These predators are not only in positions of trust but are often the child's and community's ethical, moral and spiritual authority.

Most priests do not engage in this behavior. The only difference is that when the minority do, it tarnishes the reputation of them all, as men of God are supposed to be held to a higher moral standard. Regardless of your personal beliefs, your faith or lack thereof, the concept of religion is presumed to be morally beneficial to society. However, to many individuals, both secular and religious, the pattern with which the Catholic Church systematically hid evidence and protected the abusers, discredits the organization as a whole. In some sense, "priests" have become synonymous with "pedophiles," which may be an unfair assessment, but the scope of the scandal and the number of people affected by it raise too many concerns.<sup>16</sup>

Yet, why did these predators so often choose to embed themselves in the Catholic Church or any religious entity for that matter?<sup>17</sup> It can be boiled down to five main reasons: (1) the organizational infrastructure of religious entities during the mid to late 1900s provided legitimacy and credence to the status of clergy members. This isn't to suggest that predators don't embed themselves in religious entities today, however, the heightened "status" of being a clergy member is no longer as prevalent in the U.S.; (2) easy access to a large pool of potential victims, both young and old, that they otherwise might not have come in contact with; (3) some religious entities require

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<sup>15</sup> Juveniles (children ages 0-17) that were sexually abused knew their abuser 93% of the time. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement* (2000), <https://bjs.ojp.gov/content/pub/pdf/saycrle.pdf>.

<sup>16</sup> In just Spain alone, it is reported nearly 200,000 children have been sexually abused since 1940. See Kathryn Armstrong, *Spanish Church Sexual Abuse Affected 200,000 Children, Commission Finds*, BBC NEWS (Oct. 28, 2023), [www.bbc.com/news/world-europe-67238572](http://www.bbc.com/news/world-europe-67238572).

<sup>17</sup> See Lizzy Davies, *Did Pope Francis Really Say 2% of Priests Are Pedophiles?*, THE GUARDIAN (July 14, 2014), [www.theguardian.com/world/2014/jul/14/pope-francis-priests-paedophiles-la-repubblica](http://www.theguardian.com/world/2014/jul/14/pope-francis-priests-paedophiles-la-repubblica). ("BishopAccountability.org...had figures suggesting that the proportion of US priests accused of abuse from 1950 until 2013 was about 5.6%."); see also Karen J. Terry et. al, THE CAUSES AND CONTEXT OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS IN THE UNITED STATES, 1950-2010 (2011) (roughly 11,000 incidents of sexual abuse were reported between 1950 and 2002 but has decreased in frequency over the past two decades.)

members to expose their faults or sins directly to the clergy (often through confession) giving them information to better target their victims' weaknesses; (4) the organizations often tried to avoid bad publicity by settling disputes, preferring to transfer clergy, defrock them, or have them leave quietly; and (5) at least nowadays, in civil lawsuits victims will go after the institution with deeper pockets rather than the individual.<sup>18</sup> Though, at least with respect to criminal liability, the perpetrators are often held to account.

Overall, CSA typically occurs more frequently to girls than boys.<sup>19</sup> However, at least with respect to sexual abuse stemming from religious entities, there is an aspect of gender that plays a role. Some studies suggest that clergy sexual abuse more frequently targets juvenile males.<sup>20</sup> As well, the vast majority of perpetrators are male.<sup>21</sup> There are a combination of factors people use to theorize why this is the case: the church's attitude toward sexuality—specifically how celibacy can stunt a priest's psychosexual development; the church often reveres shame through their unattainable moral expectations, creating a cycle which encourages acts of shame in order to repent the transgression; and lastly, many priests themselves suffer from psychological and emotional development problems often stemming from their own trauma or abuse as children.<sup>22</sup>

Survivors of childhood sexual abuse are commonly plagued by guilt, fear, shame, distrust,

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<sup>18</sup>Joe Navarro, *Why Predators Are Attracted to Careers in the Clergy*, PSYCHOLOGY TODAY (Apr. 20, 2014), [www.psychologytoday.com/us/blog/spycatcher/201404/why-predators-are-attracted-to-careers-in-the-Clergy](http://www.psychologytoday.com/us/blog/spycatcher/201404/why-predators-are-attracted-to-careers-in-the-Clergy).

<sup>19</sup> Karen Terry & Jennifer Tallon, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950-2002*, JOHN JAY COLL. OF CRIM. JUST. 1, 51 (2004), <https://www.usccb.org/sites/default/files/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf>.

<sup>20</sup> See IICSA Research Team, *Child Sexual Abuse Within the Catholic and Anglican Churches: A Rapid Evidence Assessment*, Ind. Inquiry into Child Sexual Abuse, 29-30 (Nov. 2017), <https://www.iicsa.org.uk/key-documents/3361/view/iicsa-rea-child-sexual-abuse-anglican-catholic-churches-nov2017-.pdf>. (Compared worldwide studies to substantiate the claim that CSA by clergy occurs to boys 70-80% of the time.)

<sup>21</sup> United State Sentencing Commission (USSC), FY 2017 through FY 2021 Datafiles, "*Quick Facts — Sexual Abuse Offenders*." [Ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Sexual\\_Abuse\\_FY21.pdf](https://ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Sexual_Abuse_FY21.pdf).

<sup>22</sup> See Karen Terry et. al, *supra* note 19, at 168; For more information on the psychology of priests see Eugene C. Kennedy, Victor J. Heckler, and Frank J. Kobler, *Clinical Assessment of a Profession: Roman Catholic Clergymen*, 33(1), J CLIN. PSYCHOL., 120, 128 (Jan. 1977).

or any number of undeserved emotions.<sup>23</sup> There is no way to measure the psychological toll that is placed on the victim, nor is there a way to accurately describe the breach of trust that was thrust upon them. Often, the abusive adult will convince the child that if they speak up, they won't be believed, either because of the abuser's status or the child's lack thereof. Silencing the victim is an aspect of the abuse itself, and as a result, many never come forward,<sup>24</sup> and the ones that typically report the abuse often wait a very long time.<sup>25</sup> Initially, when victims and members within the church did begin to report abuses, they were often encouraged or coerced to silence the reports and cover up the abuse, both by the church and its followers.<sup>26</sup> Many of the first claims were settled secretly, and confidentiality was demanded by the Church in an effort to keep victims from discovering each other and to keep cases out of the media.<sup>27</sup> All of this is to suggest, it is impossible to untangle the full scope of the abuse, how widespread it is, and just how many and to what extent children's lives were destroyed as a result.

### C. "Spotlight" on The Church

Denoted "patient zero" by victims and advocates, is Father Gilbert Gauthé of the Diocese

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<sup>23</sup> Child sexual abuse has been shown to lead to physical health issues like increased heart problems, issues conceiving, depression, generalized anxiety disorder, and 73% of victims are reported to have PTSD. Moreover, rates of self-harm have been shown to be as high as 32%, suicidal tendencies are six times greater than the general population, and most importantly, victims of CSA may be two to four times more likely to be revictimized. IICSA Research Team, *supra* note 20, at 12-15.

<sup>24</sup> See Kamala London et. al, *Review of the contemporary literature on how children report sexual abuse to others: Findings, methodological issues, and implications for forensic interviewers*, 16(1) PSYCHOLOGY PRESS, 1, 35 (2008), <https://kamalalondon.files.wordpress.com/2019/09/london-bruck-wright-cci-2008.pdf>. ("Disclosure rates of child sexual abuse vary as much as between 24% and 96%.")

<sup>25</sup> This implicates issues with statutes of limitation, discussed further below. See Lucy McGill & Rosaleen McElvaney, *Adult and Adolescent Disclosures of Child Sexual Abuse: A Comparative Analysis*, 38(1-2) J. INTERPERSONAL VIOLENCE 1163, 1164-65 (2023), <https://doi.org/10.1177/08862605221088278>. ("It is estimated that between 55% and 70% of those who experience sexual abuse as a child delay disclosure until adulthood...[l]engths of delay vary but...a review of 15 studies of adults found that the mean age of disclosure for adult participants was between 40 and 50 years of age.")

<sup>26</sup> Rachel Donadio, *The Spotlight Effect: This Church Scandal Was Revealed by Outsiders*, THE ATLANTIC (2019), <https://www.theatlantic.com/international/archive/2019/02/catholic-churchssex-abuse-scandal-was-driven-outsiders/583489>.

<sup>27</sup> *Sexual Abuse by U.S. Catholic Clergy: Settlements and Monetary Awards in Civil Suits*, BISHOP ACCOUNTABILITY (Sept. 16, 2019), <http://www.bishop-accountability.org/settlements>.



of Lafayette Louisiana. Gauthe's first allegations of sexual assault arose in 1983. The facts of the allegations coupled with Jason Berry's reporting on the church's cover-up blasted the case into the national spotlight.<sup>28</sup> Between 1972 and 1984, Gauthe was transferred six times to different parishes. Before the news of the abuse even broke, the church had offered nine families more than \$4 million, total, on the condition the settlement remained confidential. However, the Gastal family refused the settlement and sued the diocese for failing to protect their son, Scott, who was repeatedly abused by Gauthe to the point of hospitalization. Scott, at 10 years of age, graphically testified about the abuse and of his fear that Gauthe would break into his home, stating that he "would stay up all night checking the locks."<sup>29</sup> The parties settled after an appeal for \$1 million.

Evidently, January 6th in the United States is a day dedicated to eroding the public's faith in American institutions. On January 6, 2002, the Boston Globe published its first article, in a series of reports from its Spotlight investigative team, headlined "Church allowed abuse by priests for years."<sup>30</sup> It cannot be overemphasized how vital the media was in exposing this scandal.<sup>31</sup> The reports made it clear that while clergy members were perpetrating these heinous crimes the Catholic Church was willfully and knowingly covering up the abuse. The Boston Globe learned that instead of removing many of these offenders, church leaders had transferred some of the clergy to new assignments where the priests had unmitigated access to children—they were not psychologically assessed nor treated—and parents were not warned or notified.<sup>32</sup>

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<sup>28</sup> Jason Berry, *The Tragedy of Gilbert Gauthe*, BISHOP ACCOUNTABILITY (May 22, 1985), [www.bishop-accountability.org/news/1985\\_05\\_23\\_Berry\\_TheTragedy.htm](http://www.bishop-accountability.org/news/1985_05_23_Berry_TheTragedy.htm).

<sup>29</sup> Gauthe admitted to sexually abusing 37 minors during the trial. He later told a psychologist that he had abused more than 400 children. Madeleine Baran, *It All Began in Lafayette*, MINN. PUB. RADIO (July 21, 2014), <http://minnesota.publicradio.org/collections/catholic-church/betrayed-by-silence/ch1/>.

<sup>30</sup> Michael Rezendes, *Church Allowed Abuse by Priests for Years*, BOSTON GLOBE MEDIA (Jan. 6, 2002), [www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html](http://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html).

<sup>31</sup> Evidently the Boston Globe's efforts were crucial enough to adapt the investigation into a movie. McCarthy, T. *Spotlight*. OPEN ROAD FILMS (II) (2015).

<sup>32</sup> Michael Rezendes, *supra*, note 30.

The Boston Globe's investigation propelled the issue of CSA into the mainstream news, starting with an enormous cover-up in their own city. In 2002, the Boston archdiocese was sued for protecting Father John Geoghan for decades. By the late 1990s the church had confidentially settled over fifty claims involving Geoghan's victims for more than \$10 million.<sup>33</sup> The 2002 litigation led to a settlement with another eighty-six (86) victims for another \$10 million. Geoghan is a prime example of church involved cover-ups. Over thirty (30) years Geoghan was formally accused of abusing at least 150 boys, but many believe it could be as high as 500. The Dioceses' own files proved their knowledge of the abuse, showing that they did not report it to law enforcement or their higher-ups, and that they repeatedly transferred him to positions where he could access children.

It is important to note that this is not a problem exclusive to the United States. Australia, France, Ireland, Italy, Spain, and others, each have had thousands of accusations against Catholic clergymen between 1950 and 2020.<sup>34</sup> This has placed significant pressure on the Vatican around the world. So much so, civil actions in U.S. courts have directly implicated the Vatican. In 2018, Manuel Vega sued the Holy See in California, seeking injunctive relief to release any and all documents and names of abusive clergy known to the Vatican.<sup>35</sup> As well, in 2019, five survivors, three of which are brothers, filed suit against the Vatican in the U.S. District Court in Minnesota

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<sup>33</sup> *Id.* ("Before Geoghan ever got to Weston in 1984, he had already been treated several times and hospitalized at least once for molesting boys...he had been removed from at least two parishes for sexual abuse, he was removed from St. Andrew's after casually admitting he had molested seven boys...[yet] the cardinal gave Geoghan a fresh start at St. Julia's.")

<sup>34</sup> An independent inquiry concluded there were about 216,000 victims in the French Catholic Church in the same time frame. Clodagh Kilcoyne, *The Global Scale of Child Sexual Abuse in the Catholic Church*, AL JAZEERA MEDIA NETWORK (5 Oct. 2021), [www.aljazeera.com/news/2021/10/5/awful-truth-child-sex-abuse-in-the-catholic-church](http://www.aljazeera.com/news/2021/10/5/awful-truth-child-sex-abuse-in-the-catholic-church).

<sup>35</sup> Amanda Lee Myers & Nicole Winfield, *California Man Sues Vatican for Names of Abusers Worldwide*, THE ASSOCIATED PRESS (Oct. 4, 2018), <https://www.apnews.com/7811d7ffb8aa4158919df13dad0d94e7>.

seeking similar injunctive relief to Mr. Vega.<sup>36</sup> These suits were ultimately dismissed because no court has ever adopted a legal argument that allows liability to be attached to the Vatican.

### **III. FIRST AMENDMENT IMPLICATIONS**

The First Amendment, in pertinent part, states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>37</sup> These two clauses, collectively referred to as the “religion clauses,” prohibit government function in distinct, but often overlapping ways: the Establishment Clause, forbids the government from establishing an official national religion, unreasonably favoring one religion over another, and preferring religious groups over secular groups or vice versa; whereas, the Free Exercise Clause reserves the right of American citizens to choose, practice, believe and act in accordance with whatever faith they choose, and forbids the government from passing laws that would unreasonably restrict that God given right.

The initial victims of clergy sexual abuse had virtually no form of recourse for institutional liability as religious organizations had numerous avenues of defense. Primarily the doctrine of church autonomy, which is rooted in both religion clauses, gave courts pause to even consider the merits of a claim against a religious institution. If a case did get to court, defenses like charitable immunity, sovereign immunity and lapsed statutes of limitation still often prohibited adjudication of the matter. Relatively recently, many courts and jurisdictions have created exemptions within the church autonomy doctrine to hear tort claims against dioceses and their officers for their involvement in covering up sexual abuse by clergy members. Many of these defenses that once insulated religious entities from liability for their involvement in child sexual abuse have been

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<sup>36</sup> Originally, the court found jurisdiction was lacking as the plaintiffs could not properly serve the Vatican. The service was quashed, and Plaintiffs were granted an additional 60 days for service. *Keenan v. Holy See Vatican City*, 521 F. Supp. 3d 825, 832 (D. Minn. 2021). However, in August of 2023 the U.S. District Court for the District of Minnesota granted the Holy See’s motion to dismiss. The court reasoned it was not able to evaluate the Church’s secrecy policy under the Foreign Sovereign Immunities Act’s (FSIA) discretionary function exception. *Keenan v. Holy, No. 19-cv-1272 (ECT/JFD)*, 2023 U.S. Dist. LEXIS 141591, at \*65-66 (D. Minn. Aug. 14, 2023)

<sup>37</sup> U.S. Const. amend. I

aggressively litigated and often rejected.

### A. Church Autonomy and the Need for Accountability

Religion, as subjective as it is, is generally a communal pursuit.<sup>38</sup> With that in mind, the Supreme Court’s line of cases from which church autonomy stems,<sup>39</sup> has ensured the internal self-governance of religious entities remains protected.<sup>40</sup> Church autonomy does not apply to any individual’s religious beliefs. The doctrine creates a zone of protection around an entity’s internal governance and bars the judiciary<sup>41</sup>—along with all civil officials and authorities—from attempting to resolve disputes implicating matters of “faith and doctrine.”<sup>42</sup> There are five types of internal governance matters where religious organizations can retain their sovereignty<sup>43</sup>: (1) interpretation of religious doctrine; (2) disputes over the organization’s polity or governance

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<sup>38</sup> Robert Alun Jones, *EMILE DURKHEIM: AN INTRODUCTION TO FOUR MAJOR WORKS*, 1, 124 (1986) <https://archive.org/details/emiledurkheimint0000jone/page/n5/mode/2up>. (“A religion is a unified system of beliefs and practices relative to sacred things...beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.”)

<sup>39</sup> See generally *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722 (1871); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 446 (1969); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 708–09 (1976); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

<sup>40</sup> The basis for church autonomy stems from both religion clauses. A secular court asserting its authority over a religious entity, in matters of internal governance, would violate both. For example, if the ministerial exception did not exist, a defense often alleged in matters of employment discrimination, an institution’s free exercise would be violated if a court could force them to either hire or fire an individual, and further, the act itself would be state establishment of a religion, either by dictating the conduct of the entity or favoring one religion over another.

<sup>41</sup> See e.g. *Smith v. White*, 7 N.E.3d 552, 558 (“It is well established that civil courts lack jurisdiction to hear or determine purely ecclesiastical or spiritual disputes of a church or religious organization.”)

<sup>42</sup> See *Watson*, 80 U.S. at 727-729 (“[W]henver questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the...church judicatories...the legal tribunals must accept such decisions as final, and binding...The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine...is unquestioned.”); *Hosanna-Tabor*, 565 U. S. at 184 (“The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”); see also *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (“state interference in that sphere would obviously violate the free exercise of religion, any attempt by the government to dictate or even influence such matters would constitute one of the central attributes of an establishment of religion.”)

<sup>43</sup> Advocates of church autonomy have relied on the argument that the church possesses a “sphere of sovereignty” whose authority is at least co-equal to that of the state. The logic being, at least in part, that only God can be sovereign. Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 83 (2009); see also Nicholas Wolterstorff, *Abraham Kuyper on the Limited Authority of Church and State*, 7 GEO. J.L. & PUB. POL’Y (2009).

structure; (3) the hiring, training, supervising, promoting, and removing of clergy, and other agents with explicitly religious roles; (4) appointment and expulsion of members; and (5) internal communications of the entity to the full extent of the prior four.<sup>44</sup>

This is where many victims, academics, and religious scholars take issue with the doctrine. All of these privileges, at least with respect to matters of sexual abuse, threaten to put religious institutions above the law. There are no “salutary goals promoted by the application of autonomy principles to situations where decisions of ecclesiastical authorities ignore the devastating human cost of the illegal actions of their employees.”<sup>45</sup> This becomes abundantly clear when matters of church discipline, i.e., reprimanding, relocating clergy, defrocking, reporting abuse, are classic instances of church autonomy. How, then, can institutions be held accountable when there are no incentives for exercising caution to reduce incidences of abuse? Their “internal governance” could, and has, concealed significant abuse in most of these ways.

In *Jones v. Wolf*, the Supreme Court gracefully deviated from its line of church autonomy cases when confronted with a property dispute over the Vineville Presbyterian Church of Macon, Georgia.<sup>46</sup> The issue was whether the civil court had the subject-matter jurisdiction to hear the property dispute, or whether it was to be left to the church judicatories. The Supreme Court made it clear that lower courts have the authority to adjudicate the civil matter of property ownership.<sup>47</sup>

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<sup>44</sup> Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC'Y REV. 244, 262-263 (2021), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/I4btyvqwrQpjPJYU8zaNfiRJAxMSsPDn2H1bxnn.pdf>.

<sup>45</sup> See Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 54 (2017).

<sup>46</sup> See *Jones v. Wolf*, 443 U.S. 595, 597 (1979). The church was a member of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS), and a minority faction of the church voted to separate. *Id.* at 598. As a result, the factions each sought ownership of the church for themselves. Under the polity of the PCUS, “the government of the local church is committed to its Session in the first instance, but the actions of this assembly or “court” are subject to the review and control of the higher church courts, the Presbytery, Synod, and General Assembly, respectively.” *Id.*

<sup>47</sup> *Id.* at 602 (citing *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447) (“There can be little doubt about the general authority of civil courts to resolve this question [of who is to possess the property.] The State has...[a] legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.”)

Further, the Court, using the “neutral principles” approach, distinguished matters involving the interpretation of doctrine, which is protected by church autonomy, from those involving the application of doctrine. While the religion clauses do severely restrict a civil court’s authority to adjudicate disputes involving “faith and doctrine,”<sup>48</sup> a state may adopt any approach for settling church property disputes “so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.”<sup>49</sup> Thus, the application of neutral principles has created a gap in the Church’s defenses, at least with respect to disputes not involving religious doctrine, like sexual abuse tort claims, as a court need only make an objective determination through the application of the law. As a result, no religious entities have ever argued that CSA committed by their clergy is “rooted in religious beliefs,” as there is of course no such religious basis for enabling or protecting sexual abusers.<sup>50</sup>

In 1990, eleven years after *Wolf*, the Supreme Court created another neutrality test for the adjudication of Free Exercise claims. In *Employment Division v. Smith*,<sup>51</sup> the Supreme Court held that neutral, generally applicable laws that restrict religiously motivated action only violate the Free Exercise Clause when they are emboldened by “other constitutional protections, such as freedom of speech and of the press.”<sup>52</sup> However, the *Smith* line of Free Exercise cases did not apply to religious disputes, a holding further reinforced by the Supreme Court in *Hosanna-Tabor*. In *Hosanna-Tabor*, the Court addressed whether or not the “ministerial exception,” an extension

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<sup>48</sup> The First Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *See Serbian Orthodox Diocese*, 426 U.S. at 724-725; *e.g. Watson*, 80 U.S. at 733-734.

<sup>49</sup> *Wolf*, 443 U.S. at 602 (*quoting* *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970).)

<sup>50</sup> *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002).

<sup>51</sup> 494 U.S. 872, 874 (1990). Two employees were fired after ingesting peyote for sacramental purposes during a Native American Church service. They then applied for state unemployment but were denied benefits because peyote use was criminal, meaning they were fired for work-related misconduct. *Id.* at 875.

<sup>52</sup> The Court reasoned that strict scrutiny had never been used in Free Exercise claims to invalidate government regulations outside the unemployment compensation arena, and especially has never been used to require exemptions from neutral, generally applicable criminal laws. *Id.* at 872.

of church autonomy, allows churches to discriminate against employees and potential employees.<sup>53</sup> The Church premised its defense on the “ministerial exception,” which serves as an affirmative defense, i.e., regardless of whether or not religious belief motivated the discriminatory act, the church has discretion to hire and fire in whatever manner they so choose.<sup>54</sup> The court conceded that the ADA (the relevant anti-discrimination statute) was a neutral, generally applicable law which would otherwise be subject to judicial scrutiny. Nonetheless, they held in favor of the Church, affirming, and in part advancing, the Church’s right to control their internal governance.<sup>55</sup>

Many struggle to delineate how or why *Hosanna-Tabor*’s facts are different from *Smith*, but the Court made clear that they are.<sup>56</sup> If there was no such distinction, then church autonomy would have been effectively eliminated by *Smith* as most laws are neutral, generally applicable laws. Either way, *Smith* and *Hosanna-Tabor* are not the current standard applied to church autonomy issues raised in tort claims for sexual abuse cases. The Court in *Hosanna-Tabor*

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<sup>53</sup> Cheryl Perich, plaintiff, was an elementary school teacher at Hosanna-Tabor Evangelical Lutheran Church and School. She sued them alleging retaliation under the Americans with Disability Act (ADA). After learning she had narcolepsy, the Church offered her a “peaceful release” if she agreed to resign, she did not, and they fired her for “insubordination and disruptive behavior” when she threatened to sue. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

<sup>54</sup> Advocates of the ministerial exception fall into three primary categories: (1) those who defend a very broad concept of church autonomy based on their sphere of sovereignty; (2) those who believe it arises from religious voluntarism, implying ministers and members have given consent to be discriminated against; and (3) those who see it as a function of freedom of association, available to secular as well as religious entities. See Ira C. Lupu and Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1269 (2017).

<sup>55</sup> *Hosanna-Tabor*, 565 U.S. at 188 (“We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision... By imposing an unwanted minister, the state infringes the Free Exercise Clause, and the Establishment Clause.”) Further, the teacher qualified as a minister under a multi-factored analysis including: her actual title as a minister; her religious training; her responsibility to lead the children in prayer and other religious activities, among others. *Id.* at 190.

<sup>56</sup> To reconcile the two cases, here are potential reasons for the distinction: (1) the ministerial exception relies more heavily on both of the religion clauses as opposed to just free exercise; and (2) *Smith* applied law in an “outward” manner, not reaching the internal governance of a Church, i.e., the physical act of ingesting peyote, while it is a religious practice, it is criminal and was not a decision by the internal governance of a religious entity. Whereas, in *Hosanna-Tabor* firing a schoolteacher is an “internal church decision,” the board voted her out, and she was affecting the “workplace.” *Id.*

expressly limited the ministerial exception’s applicability to claims of discrimination. The main point can be boiled down to this: even the Supreme Court struggles to determine exactly where the line of internal self-governance ends for matters conducted within the church. The Court does recognize the need to balance a religious entity’s right to internal self-governance with the need for religious institutions to be held accountable.

## **B. Application of Neutral Principles to CSA**

The appropriate test to determine if church autonomy exempts an institution from liability in CSA tort claims stems from *Jones v. Wolf*, and the subsequent line of church autonomy property cases.<sup>57</sup> This is not to suggest that the application of neutral principles guarantees success in CSA matters, but it at least developed a path for success. While the Church may be able to initially cover for its members’ abuses, as courts cannot merely insert themselves into religious entities, it no longer can escape subject matter jurisdiction for its intentional or negligent conduct.

In *Redwing v. Catholic Bishop for Diocese of Memphis*, the Supreme Court of Tennessee had to determine whether or not civil liability could be imposed on the Catholic Diocese of Memphis for acts of CSA perpetrated by one of its priests, Father Milton Guthrie (“Guthrie”).<sup>58</sup> Over three decades later, Redwing, one of Guthrie’s victims, filed a civil suit against the Diocese of Memphis.<sup>59</sup> The diocese moved to dismiss arguing, in part, that state courts lacked subject-

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<sup>57</sup> See *Jones v. Wolf*, 443 U.S. 595, 603 (1979); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969); see e.g. *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357, 367 (Wash. 2012). (Discussing whether church bylaws are the kind of documents that can be interpreted using “neutral principles.”)

<sup>58</sup> Plaintiff Norman Redwing, between the ages of 7-14, was a member of the Holy Names Catholic Church in Memphis, where he was groomed by Guthrie into forming a physical relationship that included oral sex. Guthrie was not a named defendant because he was already deceased. *Redwing v. Cath. Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 441-443 (Tenn. 2012).

<sup>59</sup> Redwing’s claims consisted of (1) negligent hiring, supervision, and retention; (2) breach of the diocese’s fiduciary duty, based on Guthrie’s sexual abuse and the diocese’s knowledge of such abuse. On the fiduciary duty claim the court held that the status of a defendant as a religious institution does not per se forbid the existence of a fiduciary relationship. They further held that Tennessee’s civil courts may exercise jurisdiction over a breach of fiduciary duty claim against a religious institution, so long as the relationship is not based on a religious duty or is inextricably tied to a religious duty. *Id.* at 455.



matter jurisdiction pursuant to the church autonomy doctrine over the negligent hiring claim.<sup>60</sup> The Court held that the claims regarding the negligent hiring of a member of the clergy, as well as the negligent retention and supervision claims, do not inevitably enmesh the courts in religious doctrine or dogma so as to lack subject matter jurisdiction.<sup>61</sup> The allegations presented were merely that Guthrie was a danger to children and, nevertheless, the diocese, knew or should have known, that stationing him near children would foreseeably lead to sexual abuse on church property. Again, the distinction with such claims, using the logic of *Jones v. Wolf*, is that the application of tort doctrine to a churches conduct can in certain circumstances be addressed in a straightforward and secular way. Similarly, In *Nutt v. Norwich Roman Catholic Diocese*, the U.S. District Court for the District of Connecticut found that the Plaintiff's causes of action could proceed because analysis of such claims would not require "impermissible delving into issues of worship and spirituality."<sup>62</sup> Clergy sex abuse cases are distinct from other matters where the conduct is clearly ecclesiastical in nature, as neutral principles of secular law can reasonably resolve the dispute without unduly infringing upon a Church's internal governance. However, lower courts do have some difficulty in determining when facts require an analysis of ecclesiastical doctrine versus pure secular application of law. Some jurisdictions limit a court's subject matter jurisdiction to only intentional torts, and church autonomy still protects against negligence claims brought against the

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<sup>60</sup> *Id.* at 443.

<sup>61</sup> *Redwing*, 363 S.W.3d at 467; *see e.g.* *New York Annual Conference of United Methodist Church v. Fisher*, 438 A.2d 62, 68 (Conn. 1980) (holding that "[i]t is now well established that state judicial intervention is justified when it can be accomplished by resort to neutral principles of law . . . that eschew consideration of doctrinal matters such as the ritual and liturgy of worship or the tenets of faith."); *McKelvey v. Pierce*, 800 A.2d 840, 856 (N.J. 2002) (holding that the First Amendment does not apply if "the dispute can be resolved by the application of purely neutral principles of law and without impermissible government intrusion.")

<sup>62</sup> *See Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 74 (D. Conn. 1995) ("It is difficult to see how the plaintiff's claims... would foster excessive state entanglement with religion...[N]egligence does not intrude upon the free exercise of religion, as it does not 'discriminate against [a] religious belief or regulate or prohibit conduct because it is undertaken for religious reasons'...[A]n action against the defendants based upon their alleged negligent supervision of Doyle would not prejudice...the religious tenets...of Catholicism. Rather, such a determination would involve an examination of the defendants' possible role in allowing one of its employees to engage in conduct which, in general, is expressly prohibited.")

institution.<sup>63</sup> Regardless of the test a jurisdiction employs, courts have rationally developed a way to retain subject-matter jurisdiction over these disputes.

#### **IV. NARROWING OTHER METHODS OF DEFENSE**

Once more, in the beginning of the scandal, even if a plaintiff could get past issues of church autonomy, permitting a secular court to have subject-matter jurisdiction, victims alleging tortious claims against the church faced many other challenges. As mentioned previously, most clergy sexual abuse cases are brought years, if not decades, after the occurrence of the abuse and thus were often barred by statutes of limitation. Moreover, the Catholic Church has long benefited from comprehensive protections and immunities. For religious entities in the United States, this primarily took the form of charitable immunity, while around the world the Church also benefited from sovereign immunity stemming from the Vatican and principles held in international law.<sup>64</sup> As a result, even if the limitation period was tolled due to concealment or intentional misconduct by the church, victims often would not be able to reach liability or damages in the cases. However, throughout the years of litigating these issues, public policy, societal perspectives, and legislation have helped erode the scope of these doctrines so as not to protect institutions from liability.

##### **A. Charitable Immunity**

Charitable immunity is an affirmative defense granted only to charitable or nonprofit organizations that likens the organization's assets to that of a trust. Religious entities are often predominantly funded by their donors, and since it likely was not the intent of donors to have their

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<sup>63</sup> See *Gibson v. Brewer*, 952 S.W.2d 239, 247-248 (“Adjudicating the reasonableness of a church's supervision of a cleric - what the church "should know" - requires inquiry into religious doctrine...[T]his would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision. Not recognizing the cause of negligent failure to supervise clergy is not an establishment of religion because it is a "nondiscriminatory religious-practice exemption.”)

<sup>64</sup> For more on the church's use of sovereign immunity in CSA cases in the United States, see Edan Burkett, *Victory for Clergy Sexual Abuse Survivors: The Ninth Circuit Strips the Holy See of Foreign Sovereign Immunity in Doe v. Holy See*, *BYU. L. REV.* 35, 44 (2010).

donations pay damage awards in negligence suits, charitable organizations were immune from paying them.<sup>65</sup> A prime example of how the Church relied on charitable immunity to defend itself in child abuse cases is found in the 1984 New Jersey Supreme Court case of *Schultz v. Roman Catholic Archdiocese*.<sup>66</sup> There, the Court held that New Jersey's Charitable Immunity Act<sup>67</sup> shielded the Church from liability for clergy sexual abuse. Christopher Schultz, attended the Assumption School in Emerson, "a parish school owned, operated, and controlled by the defendant charity," the Roman Catholic Archdiocese of Newark.<sup>68</sup> The Church employed Robert Coakley who functioned both as a schoolteacher and Scoutmaster for the sponsored Boy Scout group.<sup>69</sup> In 1978, while attending the Boy Scout camp, Coakley forced himself onto Schultz, and threatened Schultz to remain silent about the interaction. The abuse and threats continued into the school year prompting Chris to tell his parents. They immediately reported this to the archdiocese, but eventually in 1979, after extensive medical care and hospitalization, Chris, at the age of twelve, committed suicide.<sup>70</sup> His parents brought the claims, seeking compensation for his suffering and death as well as their own damages for the church's reckless, careless, and negligent hiring, permitting Coakley to supervise children, failing to supervise Coakley, among other negligence claims. The Church motioned for summary judgment or dismissal arguing the claims were barred

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<sup>65</sup> See *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1387-1390 (1987).

<sup>66</sup> See *Schultz v. Roman Catholic Archdiocese*, 472 A.2d 531, 536 (N.J. 1984).

<sup>67</sup> N.J.S.A. 2A:53A-7- Immunity from liability for negligence, in relevant part states ("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...be liable to respond in damages to any person...from the negligence of any agent or servant of such corporation, society or association....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.")

<sup>68</sup> *Schultz*, 472 A.2d at 532.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

by the New Jersey Charitable Immunity Act.<sup>71</sup> The majority begrudgingly found that the immunity did protect the Church given the clear legislative intent; however, it limited its ruling only to legal responsibility and showed its disdain for the protection saying, “others must reconcile the issues of moral responsibility.”<sup>72</sup> The dissent “crucified” the Church for even invoking the doctrine in a case in such a “tragic and evil setting.”<sup>73</sup> Further, the dissenting justice would have found that the “heinous character of the conduct totally negates any possibility of achieving a charitable end.”<sup>74</sup> New Jersey, in significant part due to the outcome of *Schultz*, amended its legislation to explicitly exclude charitable immunity from CSA cases.<sup>75</sup> Many jurisdictions began to rescind the doctrine when they saw how frequently churches relied on it in cases like *Schultz*. Moreover, the initial fear of exhausting entity funds for litigation and damages awards had less basis as liability insurance became more widely available.<sup>76</sup> Accordingly, today, charitable immunity is almost completely absent in most states, or at the least very limited its scope, i.e., protection for negligence claims and not intentional torts.<sup>77</sup> However, it has still appeared in recent CSA matters. In April of 2022, the Supreme Judicial Court of Massachusetts heard *John Doe v. the Roman Catholic Bishop of Springfield*, wherein an unnamed plaintiff filed suit against the Roman Catholic Bishop of Springfield alleging that the bishop sexually abused him when he was an altar boy in the 1960s and for the church’s mishandling of his complaint in 2014.<sup>78</sup> The plaintiff sought damages from the church stemming from their negligent hiring and supervision of the bishop as well as

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<sup>71</sup> *Id.* at 533.

<sup>72</sup> *Schultz*, 472 A.2d at 539.

<sup>73</sup> *Id.* at 552.

<sup>74</sup> *Id.*

<sup>75</sup> *See infra* note 87.

<sup>76</sup> *Carmella, supra* note 44, at 43.

<sup>77</sup> *See e.g.* *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 289 (2009) (Holding that the “discredited doctrine” of charitable immunity cannot apply to intentional torts like concealment and child abuse.)

<sup>78</sup> *See Doe v. Roman Catholic Bishop of Springfield*, 490 Mass. 373, 374-76 (2022).

compensatory damages for the actual abuse. The church moved to dismiss the claims, basing their argument on: (1) church autonomy, and (2) charitable immunity. The Court held for the church on the negligent hiring and supervision claims, reasoning that although charitable immunity was abolished in Massachusetts in September of 1971, it continues to govern negligence claims that arose before its abolishment.<sup>79</sup> This outcome, while terrible, is virtually nonexistent today and only becomes more rare as time progresses due to the significant legislative reform, judicial scrutiny, and social progress that has been made.

### **B. Limitation Periods and Why the Church Conceals Evidence**

The initial cases, like Gauthier, Guthrie and Geoghan, being pushed by the media in the 1980s made legislative reform inevitable as the need to address CSA is paramount—but where does one start? A considerable number of the early efforts for reform focused on extending, or “tolling,” statutes of limitation.<sup>80</sup> Statutes of limitation for nearly all types of claims vary from state to state, but at that time, civil negligence claims resulting from CSA in most states had the same applicable statutes of limitations as for other tort claims—generally two to four years from the time the victim turns eighteen. Consequently, many claims brought by victims were barred by the applicable statutes of limitation at the time. For example, in *Anonymous v. St. John Lutheran Church*,<sup>81</sup> the alleged abuse transpired in 1971-1972 when the Plaintiff was eleven and twelve years old. Per Nebraska law she had 4 years from the time she turned twenty-one to file suit.<sup>82</sup> She turned twenty-

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<sup>79</sup> The Court separately found that the claims arising from the bishop’s abuse were not protected by charitable immunity as abuse does not correlate with the Catholic Church’s charitable mission. *Id.* at 385-86.

<sup>80</sup> Statutes of limitation (“SOL”) are the time period within which the alleged wronged party must file suit. The logic being people’s memories fade over time, evidence can be lost, and it is unreasonable for potential litigants to constantly have the threat of being sued for decades-old incidents. The average SOL for normal negligence claims is 2-4 years. *See* Christy Bieber J.D., *Personal Injury Statute of Limitations by State 2023*, FORBES MEDIA (Dec. 6 2022), [www.forbes.com/advisor/legal/personal-injury/statute-of-limitations/](http://www.forbes.com/advisor/legal/personal-injury/statute-of-limitations/).

<sup>81</sup> *See Anonymous v. St. John Lutheran Church*, 703 N.W.2d 918, 921 (2005).

<sup>82</sup> *Id.*; *see also* NEB. REV. STAT. § 25-213.

one in 1982 and filed in 2002.<sup>83</sup> The alleged abuser and minister had already died. The court held that the sexual abuse claim was barred by the four year statute of limitation as the plaintiff failed to establish that: discovery was delayed or concealed by the church; the allegations made a prima facie showing of intentional infliction of emotional distress; and also failed to provide any evidence that the psychological effects of the sexual abuse constitutes a mental disorder so as to toll the limitation period for bringing the action.<sup>84</sup>

Today, according to the National Center for Victims of Crime, nearly every state has, at the least, tolled statutes of limitation for civil actions related to CSA until the age of majority.<sup>85</sup> Some states have even gone so far as to enact “windows” legislation, which allows claims that were previously barred by statutes of limitation, to be alleged again, typically within a certain time frame of the legislation's enactment.<sup>86</sup> New Jersey is a great example of this kind of legislative development. When these cases were first alleged, New Jersey, like many other states, only had a two-year statute of limitation. In 2019, a bill was passed allowing victims of child sexual abuse to bring a claim retroactively, for abuse that occurred prior to 2019, up to thirty-seven (37) years after they turn eighteen (18).<sup>87</sup> It also granted a “window” period of two years to file suit for victims previously barred by the statute of limitations. Similarly, New York enacted windows legislation through the New York Child Victims’ Act (NYCVA) for a period of one year. During which, the amount of tort claims brought against Catholic dioceses nationwide was three times the annual

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<sup>83</sup> *Id.* at 924.

<sup>84</sup> *Id.* at 925.

<sup>85</sup> State Civil Statutes of Limitations in Child Sexual Abuse Cases, NATIONAL CONFERENCE OF STATE LEGISLATORS, <https://www.ncsl.org/human-services/state-civil-statutes-of-limitations-in-child-sexual-abuse-cases>.

<sup>86</sup> *See Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462 (Conn. 2015) (Statutes were constitutional per rational basis review, permitting otherwise barred sexual abuse claims to be brought again.)

<sup>87</sup> N.J.S.2A:14-2 - Actions for injury caused by wrongful act, appointment of guardian ad litem. Revised in 2018.

average, and there was a 200% increase in reports of abuse.<sup>88</sup>

From a legal perspective, it is understandable that an entity would not want to be liable for actions taken by one of its employees, outside of their employment, which is why respondeat superior claims and vicarious liability claims limit recovery to the special duty or scope of employment.<sup>89</sup> However, what many people do not understand is why in many sexual assault and abuse cases, the Catholic Church— rather than helping and protecting victims—often ignored complaints and actively concealed evidence. What motive could they have? One issue is that they are often more concerned with protecting themselves, their reputation, and their money than those who count on them, namely vulnerable children. Studies conducted on why institutions cover up abuse have indicated this to be a part of the church's “cone of silence.”<sup>90</sup> In the past, not speaking up about issues like sexual abuse and homosexuality within the organization was intrinsic to its function, no one needed to be informed it was implied that it was not to be discussed. Today, however, the Pope himself, and many churches across the U.S., have instituted internal protections to prevent abuse in the first instance and to better respond to victims.<sup>91</sup>

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<sup>88</sup> For more on the NYCVA *see* N.Y. C.P.L.R. § 214-g (McKinney 2020); *see* Revival and Window Laws Since 2002, CHILD USA 27 (Mar. 26, 2021), <https://childusa.org/wp-content/uploads/2021/02/US-WindowsRevival-Laws-for-CSA.pdf>. (In 2019, these states enacted windows legislation: Arizona, California, Montana, New Jersey, New York, North Carolina, Rhode Island, Vermont, Washington D.C.)

<sup>89</sup> Of the two agency theories, vicarious liability is generally more successful in establishing liability. Respondeat superior is a specific form of vicarious liability under which an employer is responsible for the legal consequences of an employee's intentional tort against a third party. *See infra* note 94. Vicarious liability focuses on the agency relationship between principal and agent. The traditional scope-of-employment analysis has been largely ineffective in clergy sexual abuse cases because most jurisdictions interpret conduct narrowly, i.e., whether a church is vicariously liable depends on whether the sexual abuse of the minor was within the scope of employment. Some jurisdictions have broadened the analysis, but not many. *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999) (held it is a jury question whether vicarious liability could be imposed upon an employer if the employee was acting within the scope of his employment when he committed the acts).

<sup>90</sup> Jeff Mirus, *The Removal of the Church's Cone of Silence*, CATHOLIC CULTURE (Sept. 21, 2018), <https://www.catholicculture.org/commentary/removal-churchs-cone-silence/>.

<sup>91</sup> In 2019, Pope Francis issued an apostolic letter for all Catholic churches globally, mandating reporting to the Vatican of any suspicious behavior such as clergy sex abuse and cover-up by superiors. It also provides whistleblower protections, standards of support for victims, and investigatory requirements. Supreme Pontiff Francis, APOSTOLIC LETTER ISSUED MOTU PROPRIO: ON THE PROTECTION OF MINORS AND VULNERABLE PERSONS, [www.usccb.org/topics/catholic-safeguards/motu-proprio](http://www.usccb.org/topics/catholic-safeguards/motu-proprio).

However, the extent to which many churches have gone to conceal evidence and their knowledge of the abuse, by moving priests to different parishes, cannot be overlooked. The primary problem, at least from an outsider's perspective, is that the Church already knows the system and to what extent they can be held liable. They know that most claims are not brought for a significant period of time and might be tolled by the statute of limitations, they know that if they settle with the victim they can put confidentiality clauses in the agreement, and they also know that if documents are concealed it creates other discovery issues which may allow them to escape liability.<sup>92</sup> One of the most egregious examples of an institution misusing their right to internal self-governance did not occur within the United States. Since the mid-to-late 1980s, a handful of Italian clerics, most notably Father Nicola Corradi, have sexually abused dozens of children at the Antonio Provolo Institute for deaf and mute children in Mendoza Argentina.<sup>93</sup> Corradi had been investigated for abuses at a school in Verona, Italy, in the 1970s, but was never charged and rather than handing him over to law enforcement or defrocking him, the bishop transferred him to the Provolo Institute in the 1980s. The complaint alleges that over 65 children were abused by more than two dozen priests. The particularly vulnerable children also learned how to communicate through sign language at school, but they were not properly taught how to describe the sexual acts done to them. Consequently, the children struggled to notify people of the abuse, often not being believed, and to sign language interpreters what they were saying was incomprehensible. This is

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<sup>92</sup> The special archives of religious entities are protected from judicial interpretation, and the public, generally absent consent. They store many records, including cases heard in marriage tribunals, personal seminary and novitiate reports, ordinations and missioning's, disciplinary matters affecting status and good standing, among other matters of religious faith. Nicholas P. Cafardi, *Discovering the Secret Archives: Evidentiary Privileges for Church Records* 10(1) J. L. & RELIG. 95, 96-98 (1993), <https://doi.org/10.2307/1051170>.

<sup>93</sup> The Archdiocese of Mendoza has denied having knowledge of Corradi's background when he came to Argentina. Two nuns who worked at the Provolo school are accused of participating in the abuse or knowing about it, as are former directors and employees who allegedly knew of the crimes but did nothing. Pope Francis also served as Archbishop of Buenos Aires and headed the Argentine bishops' conference when the alleged crimes were reported in 2009. Almudena Calatrava, *Demand for Trial Against Clergy Accused of Abusing Deaf Kids*, AP NEWS (May 6, 2019), <https://apnews.com/article/021e28b563ff4ec8b0e328ecb4f432d0>.



not a typical case of concealment, but it is so important to see how far these institutions will go to protect their assets and reputations.

If a religious entity is found to have concealed evidence in the U.S. today it is generally met with additional intentional tort claims, compensatory damages, and often punitive damages. Also, since every state has mandatory reporting of abuse by clergy in some form, if they failed to do so and they had knowledge, that is typically sufficient to allege a claim for concealment.<sup>94</sup> At least with respect to confidentiality agreements, since 2002, churches are not supposed to request confidentiality in settlements per the U.S. Catholic Bishops Charter for the Protection of Children & Young People, unless confidentiality is requested by the victims.<sup>95</sup>

## **V. INSTITUTIONAL LIABILITY**

All the advancements made above have led to tremendous outcomes for victims and their families. Numerous theories of torts, both negligent and intentional, are now available to seek compensation from religious institutions. The tort system seemingly provides relief to victims in two distinct ways: (1) the narrative or storytelling function allows victims to be heard by the public, validating their loss and pain while also breaking the “cone of silence”; and (2) the relief function holds religious entities accountable for their participation in the abuse by providing financial

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<sup>94</sup> On a state-by-state basis there can be exceptions, like if the information was reported to the cleric acting as a “spiritual advisor.” See U.S. Department of Health and Human Services, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1, 8-15 (2015), <https://www.dea.gov/sites/default/files/2018-07/Clergy%20as%20Mandated%20Reporters%20of%20Child%20Abuse%20and%20Neglect.pdf>; In Tennessee, to establish a claim for fraudulent concealment a plaintiff must prove (1) that the defendant took affirmative action to conceal conduct or remained silent and failed to disclose material facts despite a duty to do so and, (2) the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence. See *Shadrick v. Coker*, 963 S.W.2d 726, 735 (Tenn. 1998) (citations omitted). Issues arise when in the exercise of reasonable care and diligence, the plaintiff could have still discovered their cause of action against the Diocese; that is, whether the Plaintiff could have discovered that, at the time of the abuse, the religious institution had prior knowledge of the cleric's proclivities. *Id.* at 735; *Doe v. Catholic Bishop for the Diocese of Memphis*, No. W2007-01575-COA-R9-CV, 2008 WL 4253628 (Tenn. Ct. App. Sept. 16, 2008) (tolling theories relied upon by Doe are only available to a plaintiff who has exercised reasonable diligence.)

<sup>95</sup> See United States Conference of Catholic Bishops, ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS, OR DEACONS 1, 10 (2011), [www.usccb.org/resources/Charter-for-the-Protection-of-Children-and-Young-People-2018-final%281%29.pdf](http://www.usccb.org/resources/Charter-for-the-Protection-of-Children-and-Young-People-2018-final%281%29.pdf).

compensation to those aggrieved. There has been so much litigation in this area that it is difficult to narrow down. Civil liability has been asserted against churches and religious entities under theories of battery, intentional or negligent infliction of emotional distress, or negligent hiring, supervision, and retention. So much so that over the course of the last twelve years 34 catholic institutions have filed bankruptcy. Since jurisdictions vary on the issues above, courts have both accepted and rejected these claims with little consistency. Seemingly, when churches are granted their right to “an *impartial* jury” of their peers, the jury grants tremendous settlements to victims.<sup>96</sup> Rightfully so, but such large awards implicate new issues for victims. Further, to prevent instances of abuse, and the tort litigation which results from it, many churches have implemented exceedingly cautious policies, i.e., using glass in meeting rooms (or at least making them visible to others), minors cannot be alone with a single adult and mandated reporting.<sup>97</sup>

#### **A. Battery**

Battery is a very easy claim to prove with respect to CSA claims. The elements only require that the defendant acted: (1) with intent to cause harmful or offensive contact with the victim and (2) the harmful contact directly or indirectly occurred.<sup>98</sup> More importantly, battery claims do not implicate first amendment questions, i.e., church autonomy. In *Malicki v. Doe*, the Court held “with regard to a third-party tort claim against a religious institution...the First Amendment does not provide a shield behind which a church may avoid liability for harm arising from an alleged sexual assault and battery by one of its clergy members.”<sup>99</sup> This means in Florida a victim can recover from the religious institution on a battery claim. However, in other jurisdictions, while the

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<sup>96</sup> U.S. Const. amend. VI

<sup>97</sup> Insurance companies now often mandate these procedures to obtain a policy. SafeChurch GuideOne Insurance, *Child Protection Policy for Churches*, GUIDEONE INSURANCE 1, 1 (April 18, 2016), [Guideone.com/sites/default/files/sr-child-protection-policy-church-pdf.pdf](http://Guideone.com/sites/default/files/sr-child-protection-policy-church-pdf.pdf).

<sup>98</sup> RESTATEMENT (SECOND) OF TORTS § 13 (1965).

<sup>99</sup> See *Malicki v. Doe*, 814 So. 2d 347, 365 (Fla. 2002.)

elements are relatively easy to establish, recovery of damages is often limited only to the individual perpetrator as the court must find that the accused intended to cause the harmful or offensive contact which often does not extend to entities or third parties.<sup>100</sup>

## **B. Negligent Hiring, Supervision and Retention**

Claims of negligent hiring, supervision, and retention are similar to the doctrine of respondeat superior in that the third-party employer is held liable for employee conduct, but whereas respondeat superior requires the act be done within the scope of employment, negligent hiring, supervision, and retention does not.<sup>101</sup> There is a jurisdictional split with respect to negligent hiring, supervision and retention claims that are alleged due to clergy sexual misconduct. As with most other torts, jurisdictions that reject the theories believe questions of hiring, supervision, and retaining clergy fall within the internal governance of the entity and would require impermissible delving into matters of “faith and doctrine.”<sup>102</sup> Jurisdictions that allow the claims require a variation of the following: in negligent hiring claims, a victim must show the institution failed to exercise reasonable care in selecting its employees; negligent supervision claims require

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<sup>100</sup> In Missouri, a battery occurs when one individual willfully touches another in a harmful or offensive manner. *See Gibson v. Brewer*, WD 50238, 1996 Mo. App. LEXIS 347, at \*11 (Ct. App. Mar. 5, 1996) (The lower court's dismissal of Gibson's battery claim against the Diocese was upheld as no one but Father Brewer can be held directly liable for the alleged battery of Michael. The court did go on to hold that Gibson's allegation of intentional infliction of emotional distress, as a result of the battery, stated a prima facie claim.)

<sup>101</sup> Under a respondeat superior claim, a victim must prove that the cleric performed an intentional tort while in the scope of employment (usually battery or assault). However, an act within 'the scope of employment' is typically limited to things done in furtherance of the business or interest of the employer. Problems arise with such claims as inappropriate sexual conduct is clearly not within the scope of employment of a church. *Joshua S. v. Casey*, 615 N.Y.S.2d 200, 201 (App. Div. 1994) (finding that respondeat superior creates liability only when the employee act was "within the scope of employment and in furtherance of the employer's business"); *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991) (stating that respondeat superior was not applicable because the church "in no way promotes or advocates nonconsensual sexual conduct between pastors and parishioners"). It also tends to fail because the action requires foreseeability, meaning the church knew or should have known that the cleric committed or would commit an intentional tort. Though, only general rather than specific foreseeability is reasonably necessary. *Riviello v. Waldron*, 47 N.Y.2d 297, 304 (1979).

<sup>102</sup> *See Watson*, 80 U.S. at 733-734; *see also Gibson*, 952 S.W.2d at 246-47 (where the Missouri Supreme Court feared judicial inquiry into those practices "would result in an endorsement" of a particular religion by approving one hiring structure and disapproving another.)

a showing that the institution “failed to supervise”; and in negligent retention claims there must be a showing that the institution retained the clergy member despite knowing he was otherwise “incompetent or unfit.”<sup>103</sup> Additionally, in some jurisdictions the victim must prove that there was an unreasonable and foreseeable risk of injury. For example, in *Malicki*, the Court reasoned that if it did not impermissibly delve into religious justifications for the hiring, and focus on whether the abuse was foreseeable, it could avoid any First Amendment issues that may arise.<sup>104</sup>

### **C. Negligent and Intentional Infliction of Emotional Distress**

Arguably the most successful claims that are alleged are based on theories of negligent or intentional infliction of emotional distress. Many victims, and their family members, because of the abuse, suffer from emotional distress that takes form in a variety of ways: depression, suicidal tendencies, post-traumatic stress disorder, anxiety, sexual dysfunction and more. To recover under a theory of intentional infliction of emotional distress (“IIED”) a plaintiff must show: (1) defendant engaged in conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency...and utterly intolerable in a civilized community"; and (2) defendant's intentional or reckless conduct was a substantial factor in causing plaintiff's severe emotional distress.<sup>105</sup> Similarly, a defendant is liable for negligent infliction of emotional distress (“NIED”) when they "unreasonably subject another to emotional distress which he should recognize is likely to result in illness or other bodily harm," regardless of his intent.<sup>106</sup>

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<sup>103</sup> See *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 782 (Wis. 1995).

<sup>104</sup> *Malicki*, 814 So. 2d at 365 (“[W]ith regard to a third party tort claim against a religious institution, we conclude that the First Amendment does not provide a shield behind which a church may avoid liability for harm arising from an alleged sexual assault and battery by one of its clergy members...the First Amendment cannot be used at the initial pleading stage to shut the courthouse door on a plaintiff's claims...arising from the institution's failure to prevent harm resulting from one of its clergy who sexually assaults and batters a minor or adult parishioner. To hold otherwise and immunize the Church...risks placing religious institutions in a preferred position over secular institutions.”)

<sup>105</sup> RESTATEMENT (SECOND) OF TORTS § 46 and comments (1965).

<sup>106</sup> *Id.* at § 312.

Child sexual abuse by clergy members seems to fall within either of these definitions, so what claim is brought really comes down to the jurisdiction. For example, in *Bonson v. Diocese of Altoona-Johnstown*, a Pennsylvania case, the court reasoned that a jury could find liability in NIED claims when “the defendant owes the plaintiff a pre-existing duty of care, either through contract or a fiduciary duty, and breach of that duty causes the emotional distress alleged.”<sup>107</sup> The Plaintiff also alleged an IIED claim. The Church defended by claiming the plaintiff did not suffer physical harm. The court established two new rulings: (1) a jury could find the churches conduct to be “extreme and outrageous” as the defendants knew that the children were unsafe around Father Downey, that there was misconduct at St. Vincent Archabbey, that the defendant had predatory sexual impulses toward children, the diocese knew of such impulses and permitted them to remain not only at the parish but with children and simultaneously failed to notify parents of the abuse; and (2) that as long as the emotional distress was accompanied by competent medical evidence, the plaintiff need not show physical harm was done.<sup>108</sup>

Despite success in some jurisdictions, IIED claims continue to face an uphill battle. The difficulty is that plaintiffs must allege active conduct by the Church that directly caused the severe distress; this normally occurs when there is concealment and failure to notify, but it is not enough to merely allege sexual misconduct by a clergy member. This can be seen in *Nutt v. Norwich Roman Catholic Diocese*, where the court held, as a matter of law, that the alleged sexual abuse, even if true, was not in furtherance of the religious institutions' business, was outside the scope of employment because the Church expressly prohibited priests from engaging in any sexual activity

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<sup>107</sup> See *Bonson v. Diocese of Altoona-Johnstown*, 67 Pa. D. & C.4th 419, 435 (C.P. 2004) (citing *Corbett v. Morgenstern*, 934 F. Supp. 680, 683 (E.D. Pa. 1996).)

<sup>108</sup> *Id.* at 444. (The court further justified their subject-matter jurisdiction, stating “Plaintiff’s causes of action against the defendants...stem from conduct that is purely a state concern. A resolution of these tort claims based in civil law does not involve interpretation of doctrinal or theological matters.”)

of any kind,<sup>109</sup> and the church did not have knowledge of the abuse.<sup>110</sup> Seemingly an attempt to balance the interest in justice for the Plaintiff with the responsibility of a church. Some suggest that CSA claims that stem from a religious entity should hold them strictly liable. Though, without significant legislation, the willingness of insurance organizations, or church participation, this is virtually impossible. Therefore, if a church genuinely has no knowledge of the abuse, did not conceal anything and they did not otherwise fail to report, many jurisdictions will not, and cannot, hold liable an entity for the actions of their clergy.

#### **D. Consequences: Bankruptcy and Implicating Other Faiths**

As tort claims have become more readily available to victims, religious institutions are coping with the mass liability they face for the actions of their clergy. Since 2002 of the 194 dioceses in the U.S., thirty-four (34) have filed for Chapter 11 bankruptcy.<sup>111</sup> This stems from both the tremendous damages they already paid,<sup>112</sup> and also functions to protect some of their assets, in an attempt to cap their liability. These bankruptcies have created several new hurdles for victims to jump through. When an entity files for Chapter 11, settlements and remedies resulting from tort litigation are distributed through bankruptcy courts where the debtor's (entity's) assets are dispersed via an approved plan on a pro rata basis.<sup>113</sup> Bankruptcy actions consolidate each individual claim into a single proceeding (essentially forcing a class action).<sup>114</sup>

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<sup>109</sup> Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 71-75 (D. Conn. 1995)

<sup>110</sup> *Id.* at 76.

<sup>111</sup> *Bankruptcy Protection in the Abuse Crisis*, BISHOP ACCOUNTABILITY, <http://www.bishop-accountability.org/bankruptcy.htm>.

<sup>112</sup> See Sarah Martin, *\$4 Billion Cost for National Abuse Compensation Scheme*, BISHOP ACCOUNTABILITY (2016), [https://www.bishop-accountability.org/news2016/11\\_12/2016\\_11\\_05\\_Martin\\_4Billion.htm](https://www.bishop-accountability.org/news2016/11_12/2016_11_05_Martin_4Billion.htm).

<sup>113</sup> The religious entity has the exclusive right to file a plan during the first 120 days of the case. There are exceptions, if a trustee is appointed, if the entity does not meet the 120-day deadline, or if they fail to obtain consent within 180 days of filing, any party in interest may propose a plan. See 11 U.S.C. § 1121.

<sup>114</sup> This is great for efficiency purposes of the court as case-by-case litigation is lengthy and costly with inconsistent results to victims. See Adi Marcovich Gross, *Morally Bankrupt: Bankruptcy Law, Corporate Responsibility, and Sexual Misconduct*, 97(3) AM. BANKR. L. J. 481, 495 (2023), <https://www.ablj.org/wp-content/uploads/2023/10/Post-Template-2-TLM-Finalwfootnotecorrection.pdf>.

Defenders of using bankruptcy as a way to resolve mass tort litigation argue the process equitably distributes an entity's assets and insurance coverage to all claimants.<sup>115</sup> This process basically holds the entity strictly liable and compensates all claimants regardless of the severity of their injury or the order in which they filed their claims.<sup>116</sup> Although these pro rata plans limit a claimants recovery, bankruptcy is relatively expedient and guarantees at least some compensation. Critics argue it is coercive and undermines many victims' rights. Since bankruptcy actions consolidate victims into a single class, before a plan is implemented, the class as a whole must vote to accept or reject it. Each claimant has equal voting power, and they usually must form a majority of at least 75%.<sup>117</sup> This process can pit victims against each other, as those who object to the plan are often coerced/encouraged by the majority to accept the settlement and waive their claims. Moreover, for victims to recover in bankruptcy they must submit proof of their claim against the entity by a court issued deadline. This effectively accelerates the statute of limitations for victims attempting to recover from an entity that has filed for bankruptcy, getting around the newly implemented state laws.<sup>118</sup> As well, filing a bankruptcy petition initiates an automatic stay of civil actions against the debtor/entity, pausing discovery, depriving victims of their right to a jury trial, or to seek punitive damages without consent. Halting discovery further protects churches by preventing more in-depth investigation into the churches wrongful acts or obtaining evidence about their role in facilitating or covering up the abuse. Although courts have the authority to dismiss a bankruptcy case filed in bad faith, i.e., the organization is not insolvent, or is concealing evidence, they are reluctant to do so, and have not dismissed any of the filings made by churches.

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<sup>115</sup> Gross, *supra* note 104, at 499.

<sup>116</sup> *Id.* at 502.

<sup>117</sup> *Id.*

<sup>118</sup> If claimants miss the date for submitting their proof of claims, they cannot be compensated and are also barred from pursuing their rights after the bankruptcy concludes. Gross, *supra* note 104, at 491.

Much of bankruptcy undermines the express function of tort litigation, but many victims may prefer going through a bankruptcy proceeding. They will not have to testify, go through a lengthy and costly process, and are guaranteed at least some form of compensation. There is no correct answer here. Churches are going to do what they think is in their best interests, and victims will attempt to do the same. The only issue is that victims should be able to choose for themselves what process they prefer. Bankruptcy actions should not coerce victims of abuse to participate in an entity's plan lest they be barred from bringing their own action.

Many of the plaintiffs in the early 2000s that helped create the tort landscape in this area were granted such large damage awards that there were virtually no assets remaining to compensate other victims, leading to many of these bankruptcies. Out of concern for leaving other victims uncompensated, many jurisdictions and dioceses around the country have established temporary Victim Compensation Funds. In 2019, as a result of a series of large settlements and in anticipation of future litigation, all five New Jersey Archdioceses endorsed the New Jersey Independent Victim Compensation Fund (IVCP). The fund was established to ensure victims who were sexually abused by clergy can recover financial damages as an alternative to litigation or bankruptcy. Unlike litigation, the fund is speedy, transparent, and the standard of proof is significantly lower. It is administered by Kenneth R. Feinberg, Esq. and Camille S. Biros, Esq., experts that specialize in alternative dispute resolutions and victim compensation.<sup>119</sup> Filing a claim is voluntary and prioritizes those who had previously filed claims directly against dioceses. If a victim accepts payment, however, they will have to waive their ability to take further legal action against the diocese. All compensation provided to victims through the IVCP comes from Church funds directly. This alternative provides victims with a reasonable middle ground, avoiding

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<sup>119</sup> They designed and administered similar programs in New York and Pennsylvania, and also managed the 9/11 Victim Compensation Fund, and the BP Gulf of Mexico Oil Spill Fund.



litigation, costs, and providing expedient results.

Child sexual abuse and neglect are not exclusive to the Catholic Church. In some sense, there was so much attention drawn in by the Church that the spotlight was also placed on other religions. Between 2019 and 2021, due to the NYCVA's window legislation, over 150 lawsuits were filed against Jewish organizations in New York that would have otherwise been barred by statutes of limitation. Every denomination of Judaism was affected. Abuse occurred in camps, elementary and high schools, community centers, synagogues, foster care agencies among others. Some of the institutions had never been associated with CSA claims before, and many had already received allegations and knowingly ignored them.<sup>120</sup> Similarly, instances of CSA have occurred in the Hindu faith, Islam, Buddhism and many others.<sup>121</sup> To wit, a series of cases have recently been brought against the Church of Scientology. Scientology, internally and externally, is not really a religious entity known for being forthcoming.<sup>122</sup> The "Danny Masterson Rape Case" as it is colloquially known, shed light on the churches policies and procedures with respect to reporting instances of abuse. Superior Court Judge Charlaine Olmedo, who oversaw the case, went so far as to find the organization has "an expressly written doctrine that not only discourages, but prohibits"

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<sup>120</sup> For example, SAR Academy, an Orthodox School in the Bronx has had accusations since the 1980s over two former teachers. Rosenfeld has since pled no contest to at least eight counts of second-degree child molestation and admitted to abusing hundreds of children over the past decades. New cases have been filed this year (2023) because of the NYCVA. They allege Rabbi's and other staff knew of the abuse and chose not to report. *Zimmerman v. Salanter Akiba Riverdale Acad.*, No. 70024/2019, 2023 N.Y. Misc. LEXIS 16201, at \*1 (Sup. Ct. May 31, 2023)

<sup>121</sup> *See e.g.* Ex parte Prakashandand Saraswati, Nos. 03-08-00767-CR, 03-08-00768-CR, 2009 Tex. App. LEXIS 4892, at \*1 (Tex. App. June 24, 2009) (Hindu monk convicted of 20 counts of child-molestation was released on a \$10 million bond paid by Peter Spiegel, a direct-marketing executive and longtime devotee); *see* United States v. Majeed, No. 21-20060-JAR, 2023 U.S. Dist. LEXIS 130358, at \*2 (D. Kan. July 27, 2023) (In 2021, eight leaders within the group known as the United Nation of Islam were indicted for abuse, and forced child labor violations. In September 2023, prosecutors for the Kansas U.S. Attorney's Office, disclosed six girls being sexually abused and married to members of the organization); *see also* Sahan Wiratunga, *Betrayal of Trust: Child Abuse by Buddhist Monks*, GROUNDVIEWS: JOURNALISM FOR CITIZENS (May 9, 2023), <https://groundviews.org/2023/05/09/betrayal-of-trust-child-abuse-by-buddhist-monks/>.

<sup>122</sup> Many people, including ex-scientologist Leah Remini, believe the church's secrecy is merely a ploy to accumulate money. Leah filed suit against the church for defamation, harassment, IIED, and intimidation. *See* Leah Remini & Rebecca Paley, *TROUBLEMAKER: SURVIVING HOLLYWOOD AND SCIENTOLOGY* (2016).

its members from reporting one another to law enforcement.<sup>123</sup> L. Ron Hubbard's policies and technology from 1953 are considered to be the only method of addressing crimes committed by church members.<sup>124</sup> Thus, it is a "high crime" within the church to report a Scientologist to law enforcement. In 2022, three plaintiffs filed suit against David Miscavige, the church's leader, and other related entities alleging violations of the Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>125</sup> The defendant's moved to compel arbitration and dismiss the suit as the pledges of "eternal service" plaintiffs signed when they became members contained binding arbitration clauses.<sup>126</sup> The court begrudgingly granted in part to compel arbitration.<sup>127</sup>

### CONCLUSION

For many years it was exceedingly difficult to establish liability on the Catholic Church, or any religious institution, for their knowledge and willful participation in the actions of their clergy members. They not only had tremendous resources, but numerous legal safeguards: church autonomy defenses to institutional tort actions; charitable immunity; victims often never reported problems and if they did, they were much older, often well-past the statute of limitations; discovery issues when attempting to access church documents, among others. The common theme among CSA cases is that each institution claimed to lack knowledge of any abuse. Most entities had

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<sup>123</sup> James Queally & Matthew Ormseth, *Scientology's Secrets Spill into Open in Danny Masterson Rape Case*, LOS ANGELES TIMES (27 May 2021), [www.latimes.com/california/story/2021-05-27/danny-masterson-rape-trial-secretive-scientology-polices](http://www.latimes.com/california/story/2021-05-27/danny-masterson-rape-trial-secretive-scientology-polices).

<sup>124</sup> *Id.*

<sup>125</sup> The Plaintiffs, all foreign (German and British), claim that since they were 10, they were forced to work in Scientology's Cadet Org and Sea Org. They were allegedly taken from their parents, forced to pledge "eternal service" to the religion, forced to attend expensive indoctrination sessions to indebt them into service, were systematically abused physically, sexually, and emotionally, and were pressured into terminating pregnancies through a forced abortion policy. They further allege that as part of Defendants' "Sea Org" program they were isolated on cruise ships and their passports were confiscated. *Baxter v. Miscavige*, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at \*3 (M.D. Fla. Mar. 31, 2023).

<sup>126</sup> *Id.* at 3.

<sup>127</sup> It is not at the court's discretion to determine as a matter of law whether the agreements were executed under duress. *Id.* at 18-19. However, dismissal was improper, so the court stayed the suit for non-binding arbitration. *Id.*

already publicly set forth rules and policies condemning sexual abuse, yet they rarely used their “autonomous internal governance” to reprimand or punish the offenders. Moreover, sexual assault, abuse and neglect are unfortunately not exclusive to any one faith. While the Catholic Church is at the forefront of this issue, it is found in Jewish, Islamic, Hindu, Buddhist and nearly all other religious communities. It may be the case that there is some corollary between religion and abuse that makes it more probable to occur, or it might simply be the case that when abuse occurs within religion, society deems it so egregious that more attention is drawn to it.

Understandably, it is often the case that these institutional failures overshadow the tremendous progress and development that has been created both in the legal field and society at large. These heinous actions have destroyed or affected hundreds of thousands of lives, cost the Catholic Church billions of dollars, and has left a deep and permanent scar on the reputation of a once revered institution. However, the significance of the media in helping bring this problem to society's attention, as well as the advocacy and testimony by family and survivors of abuse cannot be overstated. They paved the way through the tort system so that others are now in a significantly better position to recover from religious entities when abuse occurs.

## RESOURCES

### State Child Abuse and Neglect Reporting Numbers

[www.childwelfare.gov](http://www.childwelfare.gov) - A listing of phone numbers by state to call and report child abuse.

### Childhelp.org

Provides 24/7 assistance in 170 languages to adults, children and youth with information and questions regarding child abuse. All calls are anonymous and confidential.

### CyberTipline - [missingkids.org](http://missingkids.org) (1.800.843.5678)

(National Center for Missing and Exploited Children)

National reporting hotline for internet safety.

### Homeland Security Investigations Tip Form

<https://www.ice.gov/webform/hsi-tip-form> - Form to report CSAM, CSA, Trafficking to Homeland Security.

### INHOPE: International Association of Internet Hotlines

<https://www.inhope.org/EN> - International directory of resources for reporting concerning online content.

### Virtual Global Taskforce

[Virtualglobaltaskforce.com](http://Virtualglobaltaskforce.com) - Reporting internet sexual abuse crimes against children.

### Child USA

[Childusa.org](http://Childusa.org) - the leading nonprofit think tank fighting for the civil rights of children.

### Darkness to Light

[d2L.org](http://d2L.org) or (800) 656-4673 - “a non-profit committed to empowering adults to prevent child sexual abuse.” Allows you to chat confidentially with a trained crisis counselor, 24/7 at no charge.