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# The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom

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# THE PROTECTION OF CHILDREN AND YOUNG PEOPLE: CATHOLIC AND CONSTITUTIONAL VISIONS OF RESPONSIBLE FREEDOM

ANGELA C. CARMELLA\*

**Abstract:** The religion clauses of the U.S. Constitution and the *Declaration on Religious Freedom* of the Second Vatican Council offer visions of “responsible freedom”—that is, freedom tempered by the moral claims of others and by the laws necessary to the life of the society. Both visions contain a legitimate role for the state in the protection of children, even where this requires scrutiny by the state of the decisions of religious institutions. In the context of the sexual abuse of minors by Roman Catholic clergy, this Article argues that the state’s role necessarily entails some limits on the Church’s autonomy through the imposition of tort liability, and necessarily calls for church-state cooperation on the common goal of protecting minors. Yet in both constitutional and conciliar visions of responsible freedom, the Church has sufficient room for its own internal reforms, and must not grow dependent upon the state as it pursues self-correction. The Church should use its freedom for vigorous new life, neither demanding from the state total deference to its internal decisions nor relinquishing to the state the task of moral renewal and institutional reform.

For nearly two decades, the public has grown increasingly aware of irresponsible decisions made by Catholic leadership regarding priests accused of sexual abuse of children and young people, particularly the practice of reassigning abusive priests who subsequently harmed other minors. The real magnitude of the tragedy became clear only in 2002, with court-ordered releases of thousands of pages of internal church documents and the voluntary disclosure of information by dioceses throughout the country. One revelation after another of sexual abuse confirmed yet another abuse—abuse of the constitutional freedom churches enjoy managing their own affairs.

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Not only did dioceses show themselves to be “incapable of properly handling issues relating to the sexual abuse of children by priests,”<sup>1</sup> but also, by treating these incidents as internal personnel matters, they proved astonishingly unaware of the state’s paramount interest in preventing what were, after all, criminal and tortious acts against minors.

In light of a growing consensus that the Church<sup>2</sup> has failed in the past to protect children from abusive priests, states have begun to rush in to fill the void by imposing external accountability. In the process, they are making sure the Church now knows that the matter of child sexual abuse is rightfully in the states’ jurisdiction, both civil and criminal.<sup>3</sup> In state legislatures, there are moves to add “clergy” to the list of professionals obligated to report suspected child abuse. Statutes of limitations have been extended in some states, and bills are pending in many others, to allow for criminal prosecution of abusive priests and for the filing of new tort lawsuits against dioceses. Prosecutors have become more aggressive. Grand juries have been convened and have issued reports filled with scathing criticisms of church conduct. Courts have shown little regard for constitutional claims or claims of document privilege made by dioceses. Bishops have been called to testify in court and before grand juries. And criminal liability for a diocese—once unimaginable—is now on the table. In late 2002, the Diocese of Manchester (New Hampshire) entered into an agreement with the state attorney general acknowledging that it could have been convicted under the state’s child endangerment statute and accepting state oversight of diocesan compliance with its own child abuse policies for a five-year period. The Diocese of Phoenix has also avoided prosecution by entering

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<sup>1</sup> Suffolk County Supreme Court Special Grand Jury, Term 1D, Grand Jury Report, CPL § 190.85(1)(C), <http://www.newsday.com/news/local/longisland/ny-suffolkreport0210,0,2290700.acrobat?coll=ny-top-span-headlines> (May 6, 2002).

<sup>2</sup> I use the term “Church” to refer to the leadership of dioceses and religious orders collectively across the nation. This is used as a shorthand, and is not meant to define any legal entity (there is no national Catholic Church) and is not meant to be ecclesologically descriptive (the Church is comprised of more than its ordained leadership).

<sup>3</sup> See N.H. ATTORNEY GEN., REPORT ON THE INVESTIGATION OF THE DIOCESE OF MANCHESTER (Mar. 3, 2003), available at <http://state.nh.us/nhdoj/Press%20Release/3303-diocesepart2.pdf>; Suffolk County Supreme Court Special Grand Jury, Term 1D, Grand Jury Report, CPL § 190.85(1)(C), *supra* note 1. For a discussion of the state’s complicity in the Church’s mishandling of these matters (for example, court support of delays and confidentiality agreements), see Dennis R. Hoover, *Cutting the Church Less Slack*, RELIGION IN THE NEWS, Summer 2002, <http://www.trincoll.edu/depts/csrpl/RINVol5No2/church%20less%20slack.htm>.

into an agreement with the State of Arizona.<sup>4</sup>

Now, as states respond with new forms of legislation, regulation, and prosecution, it becomes incumbent upon the Church to cultivate the practice of responsible freedom. Responsible freedom means first and foremost the proper, moral use of its freedom in the promotion of the common good. Second, it means the recognition of, and appropriate response to, legitimate state authority. Finally, it also means the maintenance of independence and integrity when the Church must work with the state on matters of common concern. Tracking this definition, I make the following proposals, some aspects of which are already underway.

First, the Church must use its broad freedom under the First Amendment to get its house in order. It must provide compassionate and comprehensive care for victims, create checks and balances for internal diocesan accountability, require interdiocesan cooperation and accountability, give increased attention to lay participation, discipline abusers under canon law, and undertake other measures to correct past abuse and prevent further abuse. This involves no less than repentance and reform of institutional church life.

Second, the Church must acknowledge the rightful extent of the state's jurisdiction in child safety. This involves future obligations to notify and cooperate with authorities when a minor is abused, and the recognition that the state properly provides criminal and civil forums for the peaceful adjudication of claims of past injuries. As a corollary, the Church must not invoke the First Amendment in ways that would deprive the state of its appropriate jurisdiction, whether in the regulatory, criminal, or tort context. It must not automatically assert "autonomy" or "confidentiality" as legal claims or defenses. Doing so only weakens such protective doctrines and makes it more likely that they will be unavailable when they truly are needed.

Finally, the recognition of the state's rightful jurisdiction must not be confused with a surrender to the state of the Church's equally rightful independence. The First Amendment still structures the

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<sup>4</sup> See Agostino Bono, *Phoenix Agreement Raises Issue of State Role in Diocesan Affairs*, CATHOLIC NEWS SERVICE, <http://www.nccatholic.org/news.php?ArtID=1050> (June 27, 2003); Hoover, *supra* note 3; Martin Kasindorf et al., *Boston Church Scandal Starts Chain Reaction*, USA TODAY, Dec. 19, 2002, at 13A; Jack Kenny, *Don't Blame 'Church' for What 'Individuals' Did*, UNION LEADER (Manchester, NH), Dec. 15, 2002, at B3; William Lobdell & Richard Winton, *Mahony Resisting Disclosure*, L.A. TIMES, Mar. 3, 2003, pt. 2, at 1; Larry B. Stammer, *States Follow California's Lead on Priest Abuse*, L.A. TIMES, Feb. 13, 2003, pt. 1, at 1; *177 Priests Resigned or Removed from Ministry Since January*, AMERICA, May 13, 2002, at 4-5.

manner of church-state interaction, and does not permit the state to run a church. The Church may have lost the trust of society to manage itself on the matter of abusive clergy, but the Church is the only institution that can restore that trust. It cannot simply permit, or invite, the state to regulate or prosecute it back to health. Thus, in short, the notion of responsible freedom imposes a duty on the Church to use its freedom for vigorous new life, neither demanding from the state total deference to internal church management nor relinquishing to the state the church's task of internal correction.

At their meeting in Dallas in June 2002, the American bishops focused their attention on the crisis and responded with disciplinary and preventive measures that create structural and procedural safeguards.<sup>5</sup> The bishops' *Charter for the Protection of Children and Young People Revised Edition* ("Charter") creates a new office at the Bishops' Conference, the Office of Child and Youth Protection, charged with implementing "safe environment" programs in each diocese, among other tasks. A National Review Board will monitor the work of the office, as well as other diocesan progress.<sup>6</sup>

The Church's response to the crisis has included the important acknowledgement that the sexual abuse of children is a matter properly within the state's jurisdiction as well as a moral, pastoral, and disciplinary matter for the Church. The *Charter*, which is binding on all dioceses, requires each diocese to report any allegation by a minor to civil authorities, and to cooperate with investigations that follow. Beyond that, however, diocesan responses to heightened government scrutiny and aggressive prosecutorial stands have been mixed. No doubt there has been a tremendous spirit of cooperation and voluntary disclosure, with diocesan officials sitting down with prosecutors in good-faith attempts to work out mutually acceptable solutions. But

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<sup>5</sup> See U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE REVISED EDITION, <http://www.usccb.org/bishops/charter.htm> (2002) [hereinafter CHARTER]; see also U.S. CONFERENCE OF CATHOLIC BISHOPS, ESSENTIAL NORMS FOR DIOCESAN/EPARCHIAL POLICIES DEALING WITH ALLEGATIONS OF SEXUAL ABUSE OF MINORS BY PRIESTS OR DEACONS, <http://www.usccb.org/bishops/norms.htm> (2002). Together the *Charter* and *Essential Norms* set out the internal processes of a priest's removal from ministry and possible laicization. Lay review boards in each diocese will provide confidential advice to the bishop regarding an evaluation of the allegations and suitability of the priest for continued ministry.

<sup>6</sup> Kathleen McChesney is the executive director of this new office (and formerly the highest ranking woman at the FBI). This office has commissioned studies to determine the causes, scope, and financial impact of the crisis. Further, the *Charter* requires background checks for all diocesan personnel in contact with children, and each diocese must have a staff person whose job is to assist victims.

some dioceses seem willing to place prosecutors "in a position to give or withhold from Catholic bishops a clean bill of moral health."<sup>7</sup> By contrast, other dioceses, fearful that the state will intrude in Church affairs, continue to make claims of "autonomy" and "confidentiality" that in some cases are clearly inappropriate and unsupportable.<sup>8</sup>

This Article sets out the constitutional framework that governs the relationship between church and state, and describes various legal issues relating to clergy.<sup>9</sup> To explore the idea of the Church's stewardship of its religious freedom, it next reviews the Catholic social teachings on the proper relationship between church and state, particularly the Church's acceptance of limits to religious freedom when public order is violated.<sup>10</sup> The Article then provides examples of ways in which the Church must cultivate the practice of responsible freedom. Under responsible freedom, the Church responds properly to the state's legitimate authority in the matter of clergy sexual abuse, and, at the same time, resists the temptation to cede to the state the task of moral and institutional reform.<sup>11</sup>

## I. THE RELIGION CLAUSES AND RESPONSIBLE FREEDOM

### A. *Institutional Freedom for the Church and Its Limits*

The religion clauses of the First Amendment to the Constitution provide that government "shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." John Courtney Murray, S.J., a Jesuit theologian and philosopher writing at mid-twentieth century, thought this language captured the classic Christian understanding of distinct spheres of authority: the state with temporal authority, and the church with spiritual authority.<sup>12</sup> The First Amendment's text, history, and tradition have deep affinities with ancient Christian notions of the necessary freedom of the person in

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<sup>7</sup> Richard John Neuhaus, *Scandal Time (Continued)*, FIRST THINGS, June/July 2002, at 75, 81.

<sup>8</sup> *Church, State and Children*, N.Y. TIMES, Mar. 6, 2003, at A30.

<sup>9</sup> See *infra* Part I.

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See generally JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960).

matters religious, and the necessary freedom of the Church from state control.<sup>13</sup>

Judicial and legislative interpretations of these clauses (and their state constitutional counterparts) have attempted to recognize this jurisdictional separation, or distinction of spheres. Broad institutional autonomy has emerged from case law under the Free Exercise Clause and the Establishment Clause, as well as from the "church autonomy" cases that rest on both clauses.<sup>14</sup> It is well-settled, for instance, that the state has no competence in theological matters.<sup>15</sup> The state cannot review internal church decisions on ecclesiastical matters that have been resolved by an authorized tribunal.<sup>16</sup> The state cannot excessively entangle itself in the internal workings of a church.<sup>17</sup> Further, courts and legislatures may grant churches exemptions from otherwise applicable laws.<sup>18</sup> Thus, a variety of legal principles work together to ensure that churches are able to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."<sup>19</sup>

But, in this process of delineating the contours of the free religious sphere, courts and legislatures also mark the boundaries of the legitimate authority of law. No freedom is absolute, and churches are subject to the requirements of coercive law in situations where courts determine that the freedom and autonomy proper to the church are not threatened. Distressingly, the state has become expansive in its claimed scope of authority over churches. The U.S. Supreme Court's

<sup>13</sup> See *id.*; see also Angela C. Carmella, *John Courtney Murray, S.J.: On Human Nature, Law, and Religious Freedom*, in LAW, SOCIETY, POLITICS, AND HUMAN NATURE: THE TEACHINGS OF MODERN CHRISTIANITY (John Witte, Jr. & Frank S. Alexander eds., forthcoming 2004).

<sup>14</sup> *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. 679 (1871).

<sup>15</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *United States v. Ballard*, 322 U.S. 78 (1944).

<sup>16</sup> See *Milivojevic*, 426 U.S. at 701-14; *Presbyterian Church*, 393 U.S. at 442-52; *Kedroff*, 344 U.S. at 110-14; *Gonzalez*, 280 U.S. at 10-19; *Watson*, 80 U.S. at 715-22. States have characterized their inability to review internal church decisions in a variety of ways: as a jurisdictional bar; as a matter of nonjusticiability; as a matter for judicial abstention; or as an evidentiary rule. See Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 224-26 (2002).

<sup>17</sup> See *Waltz v. Tax Comm'n*, 397 U.S. 664, 688-94 (1970).

<sup>18</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 888-90 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 221-22, 236-37 (1972).

<sup>19</sup> Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981).

dramatic changes in the free exercise area, for instance, have left states free to treat churches like nonreligious entities, subject to neutral laws of general applicability.<sup>20</sup> The Court's more gradual but no less dramatic changes in the establishment area frequently allow (or require) states to treat churches on a par with their secular counterparts, thereby giving religious organizations access to governmental benefits that are generally available on nonreligious terms.<sup>21</sup> And judicial deference to internal church dispute resolution, once thought to be required, is now optional in certain situations. Civil courts can adjudicate internal church disputes if they can use "neutral principles" to resolve the dispute without resort to doctrinal or ecclesiastical standards.<sup>22</sup> In fact, these jurisprudential movements toward "equal treatment" and "neutral criteria" have opened churches to a vast array of regulations and liability (as well as benefits) to an extent not thought possible thirty years ago.

Many reasons have been offered to explain the jurisprudential shift toward increased comfort with nondiscriminatory legal jurisdiction over church conduct. Some attribute the shift to a growing secularization and to society's (and courts') attendant blindness to, or overt hostility toward, religion.<sup>23</sup> Some understand it within the context of the state's tendency to employ coercive laws to crush competing normative visions.<sup>24</sup> In contrast, some consider it an inevitable development resulting from the dependence on secular public reason in

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<sup>20</sup> *Smith*, 494 U.S. at 881-90.

<sup>21</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>22</sup> See *Jones v. Wolf*, 443 U.S. 595, 602-10 (1979). This approach "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603.

<sup>23</sup> See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 105-23 (1993).

<sup>24</sup> See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7-17, 41-53 (1983).



a pluralistic society.<sup>25</sup> Others believe that it acknowledges a growing recognition that the privileging of religion is indefensible.<sup>26</sup>

I would prefer, instead, to frame this jurisprudential shift as the law's attempt, albeit imperfect and at times alarming, to provide for responsible freedom. As Murray frequently noted, the rule of jurisprudence of a free society must always be "as much freedom as possible, as much coercion as necessary."<sup>27</sup> The question of ordered liberty—how much order, how much liberty—is both perennially present and perennially difficult, and each historical period attempts its own balance. Courts grapple most explicitly with the freedom-responsibility dynamic on issues of the church-clergy relationship, and in the area of tort liability for clergy misconduct, which will be discussed immediately below. Yet, even in this period of increased social and legal responsibility for churches, there remain two basic constitutional principles that protect the unique internal life of a religious institution, which will be discussed later in this Article. First, state interests must be promoted generally, and not by singling out religion or particular religious actors.<sup>28</sup> Second, when there is necessary interaction between church and state on a matter of common concern, the state must employ an approach that is narrowly tailored to promoting its interests, and least intrusive into the internal affairs of the church.<sup>29</sup>

### B. *Institutional Freedom Regarding Clergy and the Imposition of Tort Liability*

Church members or employees who take issue with decisions made by the churches with which they are associated sometimes attempt to obtain redress from civil courts or legislatures. As a general matter, autonomy, which accords great deference to church decision making, is the governing standard in the secular judicial context. The resulting jurisprudence holds that adult members of a church have impliedly consented to church governance, and so cannot seek re-

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<sup>25</sup> See, e.g., Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 913-22 (2000).

<sup>26</sup> See, e.g., Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 926-28 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 572-74 (1998).

<sup>27</sup> JOHN COURTNEY MURRAY, *The Problem of Religious Freedom*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 127, 153-54 (J. Leon Hooper, S.J. ed., 1993).

<sup>28</sup> See *infra* notes 87-89 and accompanying text.

<sup>29</sup> See *infra* notes 90-92 and accompanying text.

dress against clergy or a church for excommunication or other discipline, or for bad religious counseling.<sup>30</sup> The unhappy member is free to leave that church.

Similar reasoning undergirds the case law in the employment context, where clergy persons have attempted to seek redress against their churches. Decisions regarding the selection of clergy receive virtually total immunity from state review or control. This constitutional outcome is not surprising given that government involvement in clergy selection and control is a hallmark of an "established" church; further, in the language of the "distinct spheres" formulation, such involvement would go beyond the state's lawful authority, which is limited to temporal matters only. Thus, as a constitutional matter of both free exercise and Establishment Clause jurisprudence, churches can train, ordain, defrock, and reinstate clergy without interference from the state.<sup>31</sup> The judicially created "ministerial exception" from civil rights laws further affirms the zone of protection churches enjoy from state interference in clergy eligibility and selection.<sup>32</sup> A woman barred from the priesthood because of her gender has no cause of action in civil court for sex discrimination. This exception even extends to sex discrimination and sexual harassment claims brought by women who serve as pastors in churches that do ordain women. They are barred from bringing such claims against their church employers—so strong is the conviction that the state must not intrude in the church-clergy relationship by taking sides in that dispute.<sup>33</sup>

Because he or she is deemed to have consented to the internal governance of the employer institution, the clergy person, as employee, must rely on those protections, if any, provided by internal canon law or other church law. Thus, in the context of the present Catholic crisis, any priests subject to laicization or removal from public ministry under the terms of the bishops' *Charter* have no recourse in civil court for reinstatement on grounds that the church deviated

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<sup>30</sup> See, e.g., *Nally v. Grace Cmty. Church*, 763 P.2d 948, 960 (Cal. 1988); *Guinn v. Church of Christ*, 775 P.2d 766, 774 (Okla. 1989).

<sup>31</sup> *Milivojevic*, 426 U.S. at 715–20, 724–25.

<sup>32</sup> See, e.g., *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553, 556–61 (5th Cir. 1972).

<sup>33</sup> *Ira C. Lupu & Robert Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002). The common remedy sought in these cases, reinstatement, is problematic. Further, defendant church must show its actions were not pretextual. See *id.* at 91. Courts are concerned that "inquiry into the possibility of a pretext involves interrogation of those in religious authority about the bases, theological and otherwise, of their decision." *Id.* at 63.

from its own rules, that its factual findings were wrong, or that the penalty was wrongfully imposed. The autonomy doctrine gives the Church broad freedom to administer the *Charter's* provisions for disciplining priests found to have sexually abused a child.

The general rule of broad institutional autonomy for the church-clergy relationship no longer applies, however, when a third party sues a church regarding clergy conduct. In fact, a growing majority of jurisdictions allow judicial scrutiny of church decision making in many tort actions. The "neutral principles" approach, which justifies civil court jurisdiction over internal church disputes when religious issues can be avoided, provides the conceptual framework for these jurisdictions. This approach involves the application of "legal rules or standards that have been developed and are regularly applied in a given field of law without particular regard to religious institutions or doctrines."<sup>34</sup> In tort actions, the "neutral principles" approach permits a court to assess the reasonableness of church decision making regarding a clergy person who has engaged in misconduct, in a way that purports to avoid religious issues. Thus, in a host of cases that overwhelmingly involve sexual misconduct of clergy, various corporate negligence theories (not vicarious liability), such as negligent supervision, negligent retention or transfer, or negligent hiring, have been used to provide redress to persons harmed by clergy behavior.<sup>35</sup>

In contrast, a substantial minority of jurisdictions applies to these tort cases the autonomy reasoning developed in the church-clergy relationship cases, thereby precluding redress for persons who sue churches in tort for various types of clergy misconduct.<sup>36</sup> These courts reject even the possibility of employing "neutral principles" to such cases. For them, any judicial inquiry about church decision making concerning clergy intrudes into the religious nature of this relation-

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<sup>34</sup> Idleman, *supra* note 16, at 259. Professor Idelman notes that jurisdiction over churches in these cases is justified on several different theories: 1) the "neutral principles" approach; 2) the conduct is considered secular; 3) the conduct is so minimally religious that the religious aspect is irrelevant; and 4) miscellaneous categories, such as conduct affecting third parties, conduct occurring offsite, or intentional or fraudulent conduct. *Id.* at 259-66. I refer to these categories collectively as the "neutral principles" approach, as they all attempt to adjudicate using familiar legal analyses, and without reference to religious matters.

<sup>35</sup> For a collection of the federal and state cases, see *Malicki v. Doe*, 814 So. 2d 347, 351 n.2 (Fla. 2002).

<sup>36</sup> See, e.g., *Napierski v. Unity Church*, 802 A.2d 391, 392-93 (Me. 2002) (refusing to recognize a cause of action for negligent supervision); *L.L.N. v. Clauder*, 563 N.W.2d 434, 441-42 (Wis. 1997) (refusing to recognize a cause of action for negligent supervision). For a collection of the federal and state cases, see Idleman, *supra* note 16, at 224-27 nn.17-27.

ship in a way that either impermissibly impairs the church's institutional free exercise or violates the Establishment Clause prohibition against excessive entanglement in church affairs. Insofar as the claims sound in negligence, these courts refuse to create (or let a jury create) a "reasonable religion" standard.

Obviously, for cases of clergy sexual abuse of minors, a jurisdiction's approach is critical to whether a victim can sue for damages. In jurisdictions that locate church decision making regarding abusive priests within the sphere of protected church autonomy, even decisions by bishops to quietly reassign known pedophiles to other parishes, motivated solely by the desire to avoid negative publicity, would constitute "irreducibly religious practices or expressions of faith and doctrine."<sup>37</sup> In such autonomy jurisdictions, a sexual abuse victim of a priest would have no recourse in tort law against the institution that knew of a priest's behavior and failed to protect his victims.

In contrast, in those jurisdictions that accept a "neutral principles" approach, the victim's claims against the church can be adjudicated if the dispute can be resolved without recourse to religious doctrines. Especially in cases like these, where the clergy person's behavior itself is not religiously motivated and actually violates the church's own teachings, courts have been more disposed to viewing the church's decision making on such matters as falling outside any legitimate sphere of church autonomy. In fact, courts increasingly reject the notion of a sacred sphere in which all decisions are "irreducibly religious." For instance, in a recent Florida case finding "neutral principles" applicable to a child's tort claim against the church in a priest sexual abuse case, the state's high court observed:

We note that many of the decisions holding that the First Amendment bars tort claims based on similar allegations in a complaint arise at the motion to dismiss stage and appear to be grounded in theoretical speculation that an inquiry into a religious institution's conduct would result in excessive entanglement. In contrast, many courts that have actually adjudicated these claims, or have at least reached the summary judgment phase, have done so based on a record revealing little, if any, doctrinal entanglement and certainly not excessive entanglement.<sup>38</sup>

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<sup>37</sup> Idleman, *supra* note 16, at 228.

<sup>38</sup> *Malicki*, 814 So. 2d at 365 n.19.

For those who remain unconvinced that the religion-less lens of "neutral principles" is wise or even possible, the autonomy approach is not the only alternative.<sup>39</sup> Some legal theorists have suggested that a strict liability theory is faithful to the religion clauses, because it avoids an intrusive judicial inquiry into a church's decision-making process while still permitting the redress of harm. Robert F. Cochran, Jr. writes, "such liability should be imposed only when . . . clerical supervisors are on notice of the clergy member's propensity toward sexual exploitation."<sup>40</sup> Cochran and Robert M. Ackerman write, "Strict liability would create a strong incentive for [churches] to protect their members but would leave it to the church to determine how best to eliminate the risk. The [church] and leaders could determine the proper combination of discipline, counseling, and oversight to be employed."<sup>41</sup> Thus, strict liability "avoid[s] having the state evaluate the reasonableness of the [church]'s response. Nevertheless, strict liability would create an incentive for the church to take effective steps to protect children . . . ."<sup>42</sup>

Cochran and Ackerman propose that strict liability be combined with damage caps in recognition of the fact that the financial effects of tort litigation can be devastating, and that large damage awards may be attributable in some cases to antireligious discrimination. Cochran suggests that legislatures impose damage limits, and that "courts . . . freely exercise the option of *remittitur* in cases where there is a danger of religious prejudice."<sup>43</sup> In the Catholic context, the financial impact is staggering. Already, dioceses have paid an estimated amount somewhere between \$350 million and \$1 billion primarily in settlement costs, and a study by the Office of Child and Youth Protection is under way to determine the actual cost.<sup>44</sup> Additionally, bankruptcy—a process that would entail an enormous loss of autonomy—is being contemplated by some dioceses.<sup>45</sup>

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<sup>39</sup> For a criticism of the "neutral principles" approach, see Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992).

<sup>40</sup> Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 486, 503 (Michael W. McConnell et al. eds., 2001).

<sup>41</sup> ROBERT F. COCHRAN, JR. & ROBERT M. ACKERMAN, *LAW AND COMMUNITY: THE CASE OF TORTS* 113 (forthcoming Jan. 2004).

<sup>42</sup> Cochran, *supra* note 40, at 503.

<sup>43</sup> *Id.* at 504.

<sup>44</sup> *Punishing the Church*, AMERICA, Apr. 22, 2002, at 3.

<sup>45</sup> See David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1183, 1192–94 (2003).

### C. *Responsible Freedom Under the First Amendment*

The trend toward the use of "neutral principles," at least in the tort context, is an example of the larger jurisprudential trend of imposing greater social responsibility on churches. Tort liability holds actors accountable for the harms that result from their actions, and is a vehicle for tempering religious freedom with responsibility. Given increased attention to church conduct by regulatory and criminal authorities, it is appropriate to explore the more general phenomenon of making the free exercise of religion the *responsibly* free exercise of religion. We begin by defining the "right to responsible freedom" under the religion clauses of the First Amendment.

Responsible freedom cannot mean simply that churches must be law abiding, although most are in most instances.<sup>46</sup> Further, responsible freedom cannot mean simply that churches owe benefits to society in exchange for their freedoms, although most churches do provide a broadly stabilizing presence in most communities and promote the common good in many ways, especially through education and social services.<sup>47</sup> Moreover, responsible freedom cannot mean simply that churches are immune from civil law only when their own alternatives meet the goals of the state and the society,<sup>48</sup> although this has often been the case. Courts have been more willing to grant exemptions from general laws when a church's alternative was congruent with the

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<sup>46</sup> Even after *Employment Division v. Smith*, courts can still mandate religious exemptions in certain circumstances. *Smith*, which removed strict scrutiny judicial review for free exercise challenges to generally applicable and facially neutral laws, did not affect all free exercise cases. See *Smith*, 494 U.S. at 888. The earlier, more protective standards remain in place for cases of hybrid rights and of individualized assessment by government, and where a law lacks generality and neutrality. See *id.* at 878-79, 882. Further, the church autonomy precedent is unaffected by *Smith*. See *id.*

<sup>47</sup> This argument of *quid pro quo* was rejected in *Walz*, 397 U.S. at 677-80, although numerous federal and state courts and legislatures have acknowledged this positive role of churches. It has been central to cases upholding vouchers to religious schools and grants to religious social services. See, e.g., *Zelman*, 536 U.S. at 672-76; *Bowen v. Kendrick*, 487 U.S. 589, 616-22 (1988).

<sup>48</sup> With respect to a civil court's deference to a church's dispute resolution, however, the existence of an alternative legal system is required. A civil court can abstain from deciding a controversy only "when it is possible for a court to find that the case is actually governed by the internal law or doctrinal principles of the church, and that there are church authorities who are charged with the responsibility of deciding such disputes." MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 499 (1996).

state's goals, and arguably provided a superior way of reaching those goals.<sup>49</sup>

Thus, the jurisprudence does not affirmatively require churches, in their freedom, to serve social goals, although they typically do. But, even though a church's constitutional freedom is not conditioned upon the provision of some social good, it is not absolute. There is one condition attached to all exercises of freedom: that the use of the freedom will not breach minimal responsibilities owed to the larger society as those responsibilities are embodied in legitimate laws. Of course this can only be articulated in the most general of terms, and must be enforced in the narrowest of ways, always with a presumption in favor of freedom. Nonetheless, the limits on freedom are clear. Legislatures grant religious exemptions only where they conclude that doing so is consistent with the well being of society.<sup>50</sup> State constitutions commonly list religious freedom as a protected liberty, but not if it involves licentious behavior or practices that threaten the peace and safety of the state. Similarly, court-mandated free exercise exemptions are conditioned explicitly on a judicial conclusion that the freedom does not undermine a compelling governmental interest.<sup>51</sup> Even supporters of frequent religious exemptions from general laws do not suggest that the right to an exemption is absolute or that the religious claimant's constitutional protection excuses harm to others. Instead, when we disagree with a judicial finding that a compelling interest is threatened, we challenge its finding that the exemption would in fact cause harm, or challenge the way the court measures the magnitude of the harm. We do not argue that the exemption should be upheld regardless of the nature or magnitude of the social harm. And finally,

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<sup>49</sup> See, e.g., *Smith*, 494 U.S. at 914-15 (Blackmun, J., dissenting) (arguing that members of Native American tribes who use ceremonial peyote are less likely to abuse recreational drugs and alcohol); *Yoder*, 406 U.S. at 224-26 (finding that Amish homeschooling and way of life did not threaten the wider society's values but, in fact, that the Amish held traditional American values of hard work and cooperation); *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (finding that Amish safety stripes on slow moving vehicles were more effective than the orange triangles required by state).

<sup>50</sup> In *Bob Jones University v. United States*, the U.S. Supreme Court went so far as to say the tax exemption of a religious school was dependent upon its compliance with important public policy (here, racial equality). 461 U.S. 574, 592-96, 603 (1983).

<sup>51</sup> Court-mandated exemptions remain operative in those categories of cases not affected by *Smith* and in judicial interpretations of statutory strict scrutiny, as that formulation is found in the federal Religious Freedom Restoration Act (as it is applicable to federal action), in state protective legislation (mini-RFRAs), and in the federal Religious Land Use and Institutionalized Persons Act. See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000); Religious Land Use and Institutionalized Persons Act, *id.* §§ 2000cc to 2000cc-5.

although the autonomy doctrine does not explicitly contemplate the possibility of an overriding compelling state interest, it is obvious that church conduct that created a significant threat to society would be deemed to fall within the state's temporal jurisdiction.

## II. CATHOLIC SOCIAL THOUGHT AND RESPONSIBLE FREEDOM

Interpretations of the religion clauses regard only obliquely the moral action of churches in the promotion of the common good, but they regard quite directly the propriety of laws imposed upon churches and the maintenance of proper institutional boundaries between church and state. That is why the notion of responsible freedom is defined by reference to the legal responsibilities churches owe to society. Catholic teachings embrace both the affirmative duty (owed not to the state but to God) of church leaders to behave morally and promote the common good in conditions of freedom, and the recognition of the legitimate role of the state to limit that freedom in some circumstances.<sup>52</sup>

Lay Catholics who have criticized the actions of the Church's leaders as the crisis has unfolded have focused, among other things, on the bishops' complete lack of accountability to local churches and to each other for their decision making. As Notre Dame's Scott Appleby said when he addressed the bishops at their Dallas conference in June 2002, the cause of the scandal was "a betrayal of fidelity enabled by the arrogance that comes with unchecked power."<sup>53</sup> Although the abuse itself was morally indefensible, so were many of the "unchecked" episcopal decisions concerning abusers and their victims. But this "unchecked" power also constituted an abuse of the broad constitutional freedoms enjoyed by the Church to manage itself almost entirely without governmental involvement. Some church officials treated the sexual violation of children and young people as mere church personnel issues, not as matters of profound state and societal concern. Thus, the enormous moral failure to protect minors was further compounded by a failure to acknowledge the legal interest of the state in the protection of minors.

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<sup>52</sup> See generally *Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 675, 696 (Walter M. Abbott, S.J. ed., 1966). "In the use of all freedoms, the moral principle of personal and social responsibility is to be observed." *Id.* at 686.

<sup>53</sup> Scott Appleby, *The Church at Risk: Remarks to the USCCB*, <http://www.usccb.org/bishops/appleby.htm> (June 13, 2002).



The Church's social teachings explicitly develop the concept of responsible freedom. This is not surprising, given the emphasis in those teachings on the social nature of the person, the importance of communities, and the state's role in protecting human dignity in its personal and communal dimensions by enforcing correlative rights and duties. My purpose in discussing the Church's position on responsible freedom is to suggest the need for coherence between its moral and legal approach to the sexual abuse crisis. The Church has publicly represented to the world in its social teachings that it demands freedom from the state and that it accepts certain limits to that freedom when the public order is involved. The Church's own understanding of what is a legitimate limit to its freedom, especially as articulated in the 1965 *Declaration on Religious Freedom* ("Declaration") of the Second Vatican Council, should inform its approach here.

#### A. Subsidiarity and the Role of the State

The social teachings began with Pope Leo XIII and his 1890 encyclical *Rerum Novarum*.<sup>54</sup> They offer a picture of a society in which multiple communities promote the common good. These communities—the family, churches, professional and occupational organizations, voluntary associations, cultural groups, and the like—have specific purposes and ends, and need freedom and autonomy to pursue their proper ends. The requisite freedom for these communities comes under the rubric of "subsidiarity," according to which tasks proper to groups that are smaller or at a lower level are not to be undertaken by groups that are larger or at a higher level. The state, through its laws, coordinates these groups in the promotion of the common good; but the state does not absorb or assume the tasks of these groups (and in fact protects their freedom by law).<sup>55</sup> These communities establish the social world for the human person and set the preconditions for human dignity and freedom.

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<sup>54</sup> See generally Angela C. Carmella, *A Catholic View of Law and Justice*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 40, at 255.

<sup>55</sup> The principle of subsidiarity is limited by the principle of "socialization," the increasing interdependence of social groups, in which the state may legitimately assume partial or full regulatory (or even substantive) responsibility for many of these efforts. This envisions a greater cooperation between nongovernmental and governmental groups, but even in a situation of increasing socialization, the independence of nongovernmental groups must not be destroyed. There is a "need to insure that the multiple forms of human community are not obliterated by the power of the state." DAVID HOLLENBACH, S.J., CLAIMS IN CONFLICT: RETRIEVING AND RENEWING THE CATHOLIC HUMAN RIGHTS TRADITION 157-59 (1979).

In addition to its legal coordination of these communities, the state can intervene in their affairs “whenever this is necessary for the remedy of harm.”<sup>56</sup> The state’s function is to ensure “public order,” defined as public peace, public morality, and the enforcement of civil rights and duties of all citizens, as it directs and coordinates social efforts in pursuit of the common good. As it exercises this public order role, the state’s purposes are “justice, freedom, security, the general welfare, and civil unity or peace.”<sup>57</sup> Catholic social thought sees law as heavy handed, and coercive in nature. Therefore, freedom is to be restricted only in specific circumstances to correct injury, and only when it is prudent to do so. In fact, law is to be limited precisely because other institutions like families and churches and schools are charged with imparting moral direction and other human goods.

### B. *Religious Freedom and the State’s Public Order Function*

The *Declaration* builds upon this vision to set out in finer detail the proper relationship between church and state.<sup>58</sup> The *Declaration* is the only conciliar document addressed to the whole world. It is considered the American contribution to the Council and was clearly influenced by the First Amendment. But it is very much a Catholic document, written in light of, and in the language of, the Catholic natural law tradition.

Consistent with the general approach taken in subsidiarity theory—legal protection of freedom for communities and cautious legal intervention only in the face of harm—the *Declaration* speaks directly to religious freedom of individuals, families, and churches. The state is necessarily secular and independent from religious institutions. It plays no sacral role and has no theological competence. It can act only with respect to temporal matters, including the protection of all aspects of human dignity. And, because the right to religious freedom is rooted in human dignity, the state is charged with its protection.<sup>59</sup>

<sup>56</sup> *Id.* at 159.

<sup>57</sup> MURRAY, *supra* note 12, at 286.

<sup>58</sup> For a discussion of the developments since the issuance of the *Declaration*, see generally HERMINIO RICO, S.J., JOHN PAUL II AND THE LEGACY OF *DIGNITATIS HUMANAE* (2002).

<sup>59</sup> Under the *Declaration*, religion is an aspect of the temporal common good. Religious freedom is considered so intricately related to the good of society that:

[G]overnment is to assume the safeguard of the religious freedom of all its citizens, in an effective manner, by just laws and by other appropriate means. Government is also to help create conditions favorable to the fostering of re-

No person or religious group can be coerced to believe or practice a faith or be restrained from its own belief or practice absent a threat to public order.

Under the *Declaration*, churches have broad freedom for public worship, teaching, and witness; for establishing and operating schools, charities, and other social organizations; and for public critique of issues of interest to the wider society. The *Declaration* states a general autonomy principle, that churches may "govern themselves according to their own norms . . . [and] have the right not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transferal of their own ministers."<sup>60</sup>

The *Declaration*, however, calls not simply for freedom, but for responsible freedom, and makes clear that all freedoms enjoyed by churches are subject to restriction whenever religious conduct violates the public order. If religious conduct of any kind violates the public order—the public peace, public morality, or the rights of others—legal intervention is warranted.<sup>61</sup> In his comments on the *Declaration*, which he helped to draft, Murray wrote:

The public order of society is a part of the universal moral order: its requirements must be rooted in moral law. Second, public order exhibits a threefold content. First, the order of society is essentially an order of justice, in which the rights of all citizens are effectively safeguarded, and provision is made for peaceful settlement of conflicts of rights. Second, the order of society is a political order, an order of peace. Public peace, however, is not the result of repressive action by the police. It is, in the classic concept, the work of justice; it comes about, of itself, when the demands of justice are met, and when orderly processes exist for the airing and settling of grievances. Third, the order of society is a moral order, at

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religious life, in order that the people may be truly enabled to exercise their religious rights and to fulfill their religious duties, and also in order that society itself may profit by the moral qualities of justice and peace which have their origin in men's faithfulness to God and to His holy will.

*Declaration on Religious Freedom*, *supra* note 52, at 685.

<sup>60</sup> *Id.* at 682.

<sup>61</sup> *Id.* at 685–87.

least in the sense that certain minimal standards of public morality are enforced at all.<sup>62</sup>

In addition, the *Declaration* points specifically to two practices that should be condemned as abuses of the right to religious freedom: when faith is shared in a coercive or disrespectful manner, especially among the poor or uneducated;<sup>63</sup> and when churches commit abuses on the pretext of religious freedom. Regarding the latter, the *Declaration* states, “[S]ociety has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection.”<sup>64</sup>

Public order clearly is implicated in the sexual abuse of children by clergy. Although it is obvious that abusive priests themselves make no claim to religious free exercise, dioceses have rebuffed tort litigation on the ground that decisions to reassign abusive priests were part of the free exercise of religion, involving matters of church doctrine and interpretation.<sup>65</sup> But this argument is not supported by the Church’s own teaching. The practice of reassigning abusive priests implicated public order in all three of its dimensions: it violated the rights of others, the public peace, and the public morality. This practice made possible the continued sexual abuse of minors, which is criminal and tortious conduct. It threatened the public peace by providing safe haven, and even public stature, for abusers, and it enabled the continuation of conduct that was widely considered by the public to be immoral. Although normally the practice of transferring a priest is a religious decision left up to his superiors, in this particular context it comes squarely within the state’s jurisdiction. The *Declaration* clearly states that “religious bodies rightfully claim freedom in order that they may govern themselves according to their own norms” with the critical proviso: only when “the just requirements of public order are observed.”<sup>66</sup> In Murray’s words, when public order is not observed, the conduct “ceases to be religious exercise and becomes a penal offense.”<sup>67</sup>

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<sup>62</sup> John Courtney Murray, S.J., *Annotations to Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II, *supra* note 52, at 675, 686 n.20.

<sup>63</sup> *Declaration on Religious Freedom*, *supra* note 52, at 682.

<sup>64</sup> *Id.* at 686.

<sup>65</sup> See *supra* notes 36–37 and accompanying text.

<sup>66</sup> *Declaration on Religious Freedom*, *supra* note 52, at 682.

<sup>67</sup> Murray, *supra* note 62 at 686 n.20. Murray read the religion clauses as articles of peace, not articles of faith. MURRAY, *supra* note 12, at 50. Because of the nonsacral nature of the state, he opposed any interpretation of the clauses that would imply “ultimate be-

Of course, to say that this action is now properly within the state's jurisdiction does not answer whether particular legal measures are proper exercises of that jurisdiction. In addition to constitutional contours that define the legitimacy of state action,<sup>68</sup> the Catholic tradition describes two kinds of checks on the way in which the state exercises its power, even when the public order justifies restrictions of religious freedom. The first is the limit of prudential judgment on human law,<sup>69</sup> and the second is the necessity of a least restrictive alternative. The prudential analysis of whether a particular law is appropriate asks two main questions: Is the law necessary or useful for the common good in the given circumstances? Is this a wise use of the government's coercive force? Then it asks subsidiary questions: Will the law be obeyed? Is it enforceable? Could it give rise to harmful effects in other areas of society? What has experience taught us in this area? What does prudent reflection tell us?<sup>70</sup> Thus, among the host of legal measures currently under consideration to address the clergy abuse crisis, all may be said to advance or protect "public order," but not all may be prudent, wise, or necessary steps for addressing past harm or preventing future harm.

When the state justifiably infringes on religious exercise, it must do so in a way that limits freedom as narrowly as possible. The *Declaration* provides that "the freedom of man [shall] be respected as far as possible, and curtailed only when and in so far as necessary."<sup>71</sup> As Murray adds, before religious conduct can be restricted, it must be clear that:

the violation of the public order be really serious; that legal or police intervention be really necessary; that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; [and] that the rule of jurisprudence of the free society be strictly ob-

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liefs, certain specific sectarian tenets with regard to the nature of religion, religious truth, the church, faith, conscience, divine revelation, human freedom." *Id.* at 48. He developed this argument in response to some Protestants who thought that the clauses embodied an individualist theology and free church ecclesiology. He would similarly deny that the clauses embody Catholic theology and ecclesiology or imply absolute legal protection for the church hierarchy. As articles of peace, the religion clauses are "only a law, not a dogma . . . not invested with the sanctity that attaches to dogma, but only with the rationality that attaches to law." *Id.* at 49.

<sup>68</sup> See *supra* Part I and *infra* Part III.

<sup>69</sup> MURRAY, *supra* note 12, at 166-67.

<sup>70</sup> See *id.*

<sup>71</sup> *Declaration on Religious Freedom*, *supra* note 52, at 687.

served, [namely], as much freedom as possible, as much coercion as necessary.<sup>72</sup>

Thus, for example, the public order rationale together with the requirement of a least restrictive alternative would not sanction a law that required a church to obtain state permission before a priest is moved from one parish to another, or to another diocese. Such oversight would violate in a most fundamental way the institutional boundaries between church and state, and would not be narrowly tailored to the needs of the state. But, the determination, in tort litigation against a church, that diocesan supervisors were reckless in their decision to reassign a priest in the face of their knowledge of his sexual abuse of other children meets the test as a narrow restriction. It does not prospectively regulate the church's freedom but allows instead the specific redress of particular past harms.

### III. RESPONSIBLE FREEDOM IN ADDRESSING CLERGY SEXUAL ABUSE OF CHILDREN AND YOUNG PEOPLE

Pursuant to both American and Catholic visions of responsible freedom, the Church must recognize the rightful extent of the state's jurisdiction over matters of public order, which involve not only the behavior of abusive clergy, but also the church-clergy relationship. Further, both American and Catholic visions require a clear institutional boundary between church and state, and the maintenance of the church's independence and integrity when the Church finds itself in a necessary relationship with the state on matters of common concern. My argument is this: to properly steward its religious freedom on the matter of child abuse, first, the Church must use its freedom for moral and structural reform. Second, in its recognition of the state's proper jurisdiction and its concern for its own independence and integrity, the Church must neither demand complete deference to its internal management nor relinquish its task of internal correction to the state. At both extremes, real internal reform will be thwarted, and constitutional freedoms vital to the life of the Church will be lost. This Part explores the topics of tort litigation and individualized church-state agreements, where the danger of these extremes is greatest.

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<sup>72</sup> MURRAY, *supra* note 27, at 153-54.

A. *Recognizing the State's Rightful Jurisdiction: Rethinking the Autonomy Defense to Tort Liability*

Tort liability undoubtedly will have an enormous impact on the future of the Church and its financial ability to carry out its mission. One might think that the best way to protect the continued free exercise of the Church would be to assert the defense of church autonomy. Most Church lawyers use such a defense (where it is still available) to block litigation against a diocese on the theory that any scrutiny of decisions made regarding the abusive priest would necessarily involve the court or jury in matters of doctrine and its interpretation. In some instances, they are correct. For instance, the claim of negligent ordination or negligent hiring cuts deeply into the freedom of churches to select clergy, and should not be able to proceed.<sup>73</sup> But, with respect to claims of negligent supervision of abusive priests (or the strict liability variant discussed above), I will make a counter-intuitive suggestion: that the best way to protect the continued free exercise of the Church is to forgo the autonomy defense. In cases where the allegations are false, or where the diocese acted in a truly defensible way, the Church should defend itself in court so that it can tell its story. "Only the legal process of discovery, by which a lawsuit proceeds through the mandatory production of documents, records, and personal testimony, will clarify the facts."<sup>74</sup> Where the allegations regarding the abuse and the clerical supervision of the abuser are credible, the focus ought to be on a peaceful and just settlement of the dispute, using a comprehensive "response of pastoral, spiritual, emotional, and restorative care," including monetary settlement.<sup>75</sup>

There are four reasons for relinquishing the autonomy defense in litigation claiming negligent supervision. It is not prudent; it con-

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<sup>73</sup> See, e.g., *J.M. v. Minn. Dist. Council of the Assemblies of God*, 658 N.W.2d 589, 593-95 (Minn. Ct. App. 2003).

<sup>74</sup> Mark A. Sargent, *Legal Defense: When Sued, How Should the Church Behave?* COMMONWEAL, June 14, 2002, at 13. It should be noted that the particular polity of a church should not be relevant to the tort of negligent supervision. Actions against a church entity for negligent supervision are easy to conceptualize in churches with hierarchical polities, where priests are under the supervision of identifiable church leaders. This is more difficult to see in congregational polities, where a pastor might serve at the invitation of a congregation, under a contract with a board of trustees or elders. To ensure parity among various church polities in the adjudication of negligent supervision actions, these causes of action should be available against whomever has the power to hire, fire, discipline, or evaluate the performance of a clergy person—in short, against the identifiable person(s) or entity charged with overseeing the conduct (and addressing misconduct) of the clergy person.

<sup>75</sup> Richard John Neuhaus, *Sexual and Related Disorders*, FIRST THINGS, Mar. 2003, at 68.

tradicts the Church's own teaching; it is not supported by the autonomy doctrine itself; and it endangers the future vitality of the autonomy doctrine.

First, prudence counsels against an autonomy defense. As a general matter, the notion of church autonomy in this context has been discredited.<sup>76</sup> Had earlier claims of autonomy (together with confidentiality) succeeded, we would not know what we now know.<sup>77</sup> Given what we do know of the internal workings of the Church on clergy sexual abuse, a defense like this only gives rise to speculation that the bishop's behavior must have been inexcusable and that the diocese simply wants to hide the truth from public view. This runs contrary to the Dallas *Charter's* promise of openness, accountability, and cooperation.<sup>78</sup>

Second, the Church's social teachings do not support the use of an autonomy defense in this context. The claim of autonomy denies the state's jurisdiction over the matter. Yet the Catholic concept of subsidiarity recognizes that "the state may intervene in intermediate communities in order to protect individuals. Communities have power; they should use that power to benefit people, not to harm people."<sup>79</sup> And, the Second Vatican Council's *Declaration* provides for legal restrictions against religious practices that violate the public order. As I have argued above, the reassignment of abusive priests who continued to harm children violated the public order in all three of its dimensions: it violated the rights of others, the public peace, and the public morality.

Moreover, the *Declaration* is clear that the state must provide a forum for the settlement of disputes. The existence of a forum for peaceful settlement of conflicts is at the heart of the state's public order role so that the rights of all citizens are "effective[ly] safeguard[ed]" and the public peace is preserved.<sup>80</sup> Public peace is, as Murray reminds us, "in the classic concept, the work of justice; it comes about, of itself, when the demands of justice are met, and when

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<sup>76</sup> When lawyers for the Archdiocese of Boston sought dismissal of five hundred lawsuits on the grounds of "autonomy," Judge Constance Sweeney denied the motion, saying that "the doctrine of autonomy that the church was asserting would give leaders 'unqualified immunity from secular legal redress, regardless of how negligent, reckless or intentional' their behavior." Lobdell & Winton, *supra* note 4, pt. 2, at 1.

<sup>77</sup> Joseph A. Reaves, *Unsung Judges Lead Way in Priest Investigations*, THE ARIZ. REPUBLIC, Feb. 23, 2003, at 1A.

<sup>78</sup> See, e.g., CHARTER, *supra* note 5, arts. 4, 7, 8.

<sup>79</sup> Cochran, *supra* note 40, at 498.

<sup>80</sup> *Declaration on Religious Freedom*, *supra* note 52, at 686-87.



orderly processes exist for the airing and settling of grievances."<sup>81</sup> A system in which accusations and defenses are played out solely in the media (with easy destruction of reputations with false accusations), without any structured forum in which to defend allegations, would be no system at all. Having a forum for the peaceful settlement of disputes is essential to justice for the Church, just as it is essential to justice for the victims.

Third, constitutional law does not support the use of an autonomy defense. Even on the most generous reading of the doctrine, the element necessary for an autonomy defense is missing in the case of sexual abuse of children: voluntariness.<sup>82</sup> Deeply embedded in the doctrine is the implied consent of members and clergy to submit to the decision-making authority of the church. If they do not like the decision, they are free to leave. But, a child cannot be said to have consented to a loss of civil legal rights because he is free to leave if he does not like the priest's behavior or the bishop's decision. Further, consent aside, this matter involves the physical health and safety of children, which is traditionally considered a state interest of the highest order, capable of outweighing an autonomy claim.<sup>83</sup>

Fourth, the long-term jurisprudential effects of the inappropriate use of the autonomy doctrine could be disastrous.<sup>84</sup> The church autonomy doctrine is essential to the freedom of churches, particularly in situations where the church's teachings do not correspond to prevailing societal opinions or norms. But, employing it in cases where wrongdoing is clear, and where there is no normative conflict with society, indicates a disregard for legitimate legal authority. In the present situation, a court that until now has accepted the church autonomy doctrine might reject it—not just in the case before it, but for all tort actions. Or, perhaps a court might decide on a complete reinterpretation, and drastic narrowing, of the doctrine outside the

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<sup>81</sup> Murray, *supra* note 62, at 686 n.20.

<sup>82</sup> See Laycock, *supra* note 19, at 1405–06. "Voluntary affiliation with the group is the premise on which group autonomy depends." *Id.* at 1405.

<sup>83</sup> *Id.* at 1406.

<sup>84</sup> These concerns are not unfounded. The U.S. Supreme Court has already demonstrated what it can do in such cases where it considers a doctrine to have been inappropriately invoked. In *Employment Division v. Smith*, the Court rejected strict scrutiny judicial review for nearly all free exercise claims because it thought the case before it stretched the logic of the free exercise claim to completely unreasonable limits. 494 U.S. 872 (1990). When, in the Court's view, drug-using drug counselors, who were fired and subsequently denied unemployment compensation because the drug use was criminal, challenged the denial on free exercise grounds, the Court saw a "system in which each conscience is a law unto itself," and a system which was bound to produce social anarchy. *Id.* at 890.

tort context. Courts might begin to assume that the behavior that is being claimed as protected by "autonomy" is not a sincere claim of religious freedom at all, but rather a cover for any intentional, negligent, or reckless decision made by a church. This could lead to further narrowing of the autonomy doctrine.

To say that the Church should defend tort claims that are defensible and settle ones that are not still does not address the financial impact of the crisis, especially as it limits service to the poor, who suffer the most from a massive redistribution of funds. As Villanova Law School's dean, Mark Sargent, has written:

[The Church's] resources are gathered and spent not for profit, but primarily for charitable, educational, and spiritual purposes. The deserving victims must get their fair share, but that does not mean that church institutions must be bankrupted to compensate what is, in relative terms, a small number of victims of a small number of priests. This is not just a matter of fairness; the social and spiritual costs of such a wealth transfer would be unsupportable.<sup>85</sup>

Good faith efforts by the Church to compensate victims and to accept responsibility should be met with damage caps or other measures aimed at protecting the financial viability of nonprofits in cases like these.<sup>86</sup>

#### B. *Maintaining Institutional Boundaries: Preventing the Loss of Church Integrity in Individualized Agreements with the State*

There are and will be child protection laws that are generally applicable to churches, as well as individualized interaction between state and church officials, on this matter, as it is a matter of common concern to both institutions. The religion clauses of the First Amendment provide ample precedent for maintaining the integrity of the church-state boundary. There are two overriding limitations on state action. First, the state is prohibited from treating this problem as a Catholic problem. It must employ general approaches for the pro-

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<sup>85</sup> Sargent, *supra* note 74, at 15.

<sup>86</sup> Making this cap available to a broad category of nonprofit institutions would avoid Establishment Clause infirmities. Additionally, in places where statutes of limitations are suspended and litigation against churches is effectively invited, damage caps would alleviate the enormous financial burden directly attributable to the change in law and would be found constitutional. *See, e.g., Tex. Monthly v. Bullock*, 489 U.S. 1 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

tection of children. Second, when there is necessary interaction between church and state on an individualized basis, the state must employ the "least intrusive alternative," that is, an approach narrowly tailored to achieving its goals.

Although the U.S. Supreme Court has been less willing to exempt religious conduct from generally applicable laws, it has made clear that the jurisprudence of the religion clauses stands firm against laws that discriminate against, or single out, religion or religious groups and laws that discriminate among religious groups.<sup>87</sup> Laws that apply to religious behavior but do not touch comparable conduct by secular actors are not generally applicable or facially neutral, and, therefore, must be justified by a compelling governmental interest. Yet typically, the fact that such laws are underinclusive means that the interest they serve is not sufficiently compelling. For if it truly promoted a compelling state interest, the law would regulate or prohibit the conduct regardless of the actor's identity, religious or secular.

Thus, the state is prohibited from treating the sexual abuse of minors as a Catholic problem, or even as a "clergy" problem. Regrettably, such abuse occurs in families, schools, voluntary associations, and in other institutions public and private—anywhere adults in positions of trust supervise or have contact with minors. The state itself has had a mixed record in monitoring and protecting abused children within its own child protective services jurisdiction. When the state acts to make the Church accountable to society for its irresponsible decisions, it must do so in a way that takes into account the breadth of the problem, and avoids targeted regulation or selective prosecution of churches by ensuring that other institutions are subject to comparable scrutiny. The protection of children from sexual abuse is clearly an interest of the highest order and, therefore, should be punished wherever it is found and prevented through generally applicable measures.

One example of a general, broadly applicable measure is the mandatory reporting statute. Clergy and other church personnel are currently required to report in many states.<sup>88</sup> New legislation is being introduced across the country to add clergy to an already broad class of professionals in many of the states that have not yet done so. Adding clergy to the list is related to the state's goal, and is not an uncon-

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<sup>87</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 452 U.S. 904 (1982).

<sup>88</sup> See Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127, 1138-39 (2003).

stitutional "targeting" of religion. At a minimum, such reporting (together with cooperation in any investigation) is necessary to ensure that the state can do its job. The bishops' *Charter* already agrees to abide by such reporting requirements.<sup>89</sup>

Protecting children from sexual abuse is no doubt a compelling governmental interest. Does that mean that any nondiscriminatory state action against a church is justified? Of course not. Nondiscrimination is not the only constitutional safeguard for churches. As we saw above,<sup>90</sup> the religion clauses preserve the fundamental jurisdictional boundary between the temporal and spiritual spheres. Church religious conduct and decisions on religious matters, which are outside the state's jurisdiction, have protection. The Establishment Clause's prohibition on excessive entanglement, though developed in the context of state support of a religious institution, is likewise a jurisdictional protection—it conveys the same prohibition against intrusion into religious matters that are beyond the rightful temporal powers of the state. The state cannot intrude so severely in internal operations that it remakes the church in its own image, or "set[s] up a church."<sup>91</sup> Based upon institutional autonomy and nonentanglement precedents, the state is required to employ the least intrusive alternative available to it when promoting its interests. Such a requirement ensures that the state remains within the proper boundaries of temporal concerns—which is the ultimate purpose and function of the religion clauses.

The possibility of unconstitutional overreaching is of particular concern when the state deals with churches not by general regulation but by specific relationships created pursuant to generally applicable tort causes of action and criminal laws. When state action necessarily intrudes in the life of a church, the law attempts to ensure that the relationship is highly structured<sup>92</sup> and that the state action is narrowly tailored to its temporal interest. For instance, the neutral principles approach purports to do this in the tort context—permitting temporal jurisdiction over a church but not over those religious matters exclusively within the church's domain. (The strict liability proposal of Cochran and Ackerman seems a better vehicle for achieving this narrowly tailored jurisdiction over church misconduct.) Further, tort liti-

<sup>89</sup> CHARTER, *supra* note 5, art. 4.

<sup>90</sup> See *supra* Part I.A.

<sup>91</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>92</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (discussing the need to have safeguards when religious and state personnel work together).

gation may be a far less intrusive form of state jurisdiction than, say, even forms of generally applicable regulation. Successful tort litigation necessarily cuts into the life of a church, but the post-litigation decisions regarding internal reforms that will prevent future harm remain in the hands of the church.

Individualized agreements between dioceses and prosecutors also are being used as measures to prevent sexual abuse of children. Some agreements ensure that the diocese will notify civil authorities in the event of any allegation of abuse. But others go further. In their agreements with state authorities, the Diocese of Manchester, New Hampshire and the Diocese of Phoenix, Arizona have accepted state oversight of their compliance with their own child protection policies, and have invited the state to shape those policies through review and comment.<sup>93</sup> The state obviously has much experience in the prosecution of child sexual abuse, can claim expertise in its prevention, and rightly shares this expertise with any group seeking to establish policies. But state participation in the development of internal church policies and state monitoring of church compliance with those policies does not comport with a "least intrusive alternative" requirement. Further, it stands in marked contrast to the state's traditional role of enacting a law, requiring a church to abide by that law, and monitoring the church's compliance with that law.

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<sup>93</sup> Because the Manchester Diocese agreed that it could have been prosecuted under the New Hampshire child endangerment statute, it entered into a "pre-indictment diversion-from-prosecution agreement" with the New Hampshire Attorney General. See John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. Rev. 1061, 1061 (2003). Pursuant to this agreement, the diocese will provide to the Attorney General each year for five years (and at other times when requested) copies of its child sexual abuse policies and protocols, for the state's review and comment. The state will audit the diocese each year for five years to ensure that it is in compliance with the terms of the agreement and with the diocesan policies on child sexual abuse. The audits may involve the inspection of records and interviews of diocesan personnel. Provision is made for the revision or amendment of the terms of the agreement. See Hillsborough County Superior Court, *In Re Grand Jury Proceedings*, No. 02-S-1154 (Dec. 10, 2002), available at <http://www.state.nh.us/nhdoj/Press%20Release/Diocese%20Final%20Agreement.pdf>; see also Kenny, *supra* note 4, at B3; News Release, Richard M. Romley, Maricopa County Attorney, Six Priests Indicted: Bishop, Diocese Sign Agreement Insuring Protection of Children, <http://www.maricopacountyattorney.org/Press/fullreleases.asp> (June 2, 2003) (containing May 3, 2003 Agreement between State of Arizona, *ex. rel.* Richard M. Romley, Maricopa County Attorney, Thomas J. O'Brien, Bishop of the Roman Catholic Diocese of Phoenix, and the Roman Catholic Diocese of Phoenix, which provides that the Maricopa County Attorney's Office and the public will have "the opportunity to provide input" into the diocese's sexual misconduct policy).

Out of a desire to reestablish trust and cooperate with authorities, other dioceses may want to enter into these types of agreements. In doing so, such dioceses should avoid provisions that permit the state to create or modify internal church policies and measure compliance with such policies. Although provisions like these give the appearance of a church rigorously getting its house in order, they may have the opposite effect because they place the church in a subordinate and dependent relationship with the state. Such a relationship makes it easy for a church, even in full compliance with the terms of the agreement, to abdicate its own moral responsibility for substantive internal reform. Permitting the state such a formative role in internal church policies signals to the state that the church has no confidence in its ability to address the crisis, and that the state can expect business as usual and must, therefore, increase its vigilance over an institution that cannot be trusted. Such an abdication of responsibility for self-governance effectively waives constitutional protections because it invites continued state oversight and entanglement. Agreements with state authorities, if used at all, should have as their primary goal a church's compliance with state law, and should not put a church into a kind of moral receivership under the supervision of the attorney general or a state agency.

#### CONCLUSION

Now is a critical time for the Church to cultivate responsible freedom. It enjoys broad freedom under the U.S. Constitution for profound moral and institutional reform. And, as it acknowledges the rightful jurisdiction of the state on matters of clergy sexual abuse of minors, the Church can neither simply demand complete deference to its internal decisions nor relinquish its task of moral renewal to the state.