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Stating Claims Against Religious Institutions

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STATING CLAIMS AGAINST RELIGIOUS INSTITUTIONS

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Abstract: Although the U.S. Constitution protects the rights of religious institutions, it confers no general immunity from liability for their contracts and torts. This Article's study of the case law indicates that claims may be stated against religious institutions if those institutions had the corporate power or ecclesiastical responsibility for the specific matter in dispute, or had themselves taken action in the matter. A general assertion of the potential to take action or potential to control is insufficient to result in a claim against the institution. Liability would reside, if at all, in the entity that has both the juridic power (under the religious polity) and the civil duty to answer for the actions of persons or other entities in the religious structure. Departure from these principles could result in an unconstitutional exercise by a court. This Article then applies these principles in a critique of tort liability asserted against religious institutions.

INTRODUCTION

In other eras, it would have been unimaginable for churches and other religious institutions to be sued. Like other charitable institutions in American society, religious institutions enjoyed a privileged status, protected not only by legal immunity for their benefits to the greater society but also held in a place of honor and respect by ordinary citizens. We still admire charities and still hold religion in a place of honor, but we expect religious institutions to be accountable when they make mistakes. It was the reality, and remains so today, that religious institutions make contracts that they break, create risks for which they must be responsible, and conduct many activities in the larger society that impact the general public, beyond their members. There is no longer any serious debate that religious organizations are held responsible for the consequences of their actions. The demise of

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charitable immunity generally, and its limitation in virtually every jurisdiction, means that these entities must pay attention to their legal relationships and conduct.[1]

For religious organizations there is another concern: that they might be held responsible for the conduct of a member, employee, or agent, or even the conduct of another related group or its members, employees, or agents, including volunteers. Religious organizations are sometimes very complex organisms. The largest consist of relations among tens of thousands of local churches, hundreds of regional judicatories, and millions of adherents bound together not by a contract of law but the bonds of a common commitment in faith. They relate to each other and to national and international religious bodies according to the dictates of religious principles and doctrines, sometimes millennia old. It is most certainly not General Motors or IBM. Even the smallest church bodies, a single church structure governed by a group chosen by the faithful, who call a pastor and follow what they hear as the Lord's voice, is not analogous to a neighborhood business. Indeed, analogies to the corporate world fail to capture the nature of religious institutions in the United States. Yet, the dawn of the twenty-first century witnesses the continuation of the litigation explosion of the last century, an explosion in which religious institutions have routinely been made defendants in various actions. The difficulty comes in identifying which entity properly is the defendant and on what bases claims might lie against it.

It is undeniable that the scandals occurring in religious institutions, especially Catholic dioceses and orders vigorously reported throughout 2002 and 2003, have also had an effect on the perception

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[1] In most states, charitable immunity is no longer available to preclude recovery. In New Jersey, which preserves charitable immunity, a beneficiary of the charity may not maintain an action in tort for the negligence of the entity and its personnel. N.J. STAT. ANN. § 2A:53A7(a) (West 2000). Those who are not beneficiaries are not precluded from recovery. *Id. Compare* Brown v. St. Venantius Sch., 544 A.2d 842, 843, 847–48 (N.J. 1988) (reversing grant of summary judgment that denied recovery to plaintiff who was injured when she fell on property abutting school because she was not a beneficiary at the time of the injury), *with* Gray v. St. Cecilia's Sch., 526 A.2d 264, 265 (N.J. Super. Ct. App. Div. 1987) (affirming summary judgment that denied recovery because plaintiff, a mother injured while picking up her son from school, was a beneficiary at the time of injury). In recent times, four states, Massachusetts, New Hampshire, South Carolina, and Texas, provided a limited immunity related to caps on recovery. *See* MASS. GEN. LAWS ch. 231, § 85K (2000); N.H. REV. STAT. ANN. § 508:17 (Supp. 2002); S.C. CODE ANN. § 33-56-180 (Law. Co-op. Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 84 (Vernon 1997 & Supp. 2003). More states immunize volunteers and volunteer boards by statute. *See* Volunteer Protection Act, 42 U.S.C. §§ 14501–14505 (2000).

of the public, the press, and the courts in assessing the culpability, if not the liability, of religious institutions. In some states, at this writing, there are well-organized campaigns to narrow the defenses available to charitable institutions that care for children,[2] strip all religious institutions of the confidentiality that is expected to attach to a communicant's penitential communications,[3] and open private personnel files for public rummaging.[4] Such is the state of litigation in 2003. Although it is tempting to think that the scandal has ripened full blown into open litigation season on religious institutions, most religious institutions have reported an increase in litigation for many years[5] and the situation today in the United States is but the latest example of this phenomenon. In more recent times the task of allocating responsibility, and then liability, and stating a sound and constitutional basis on which the case may move forward has become more—not less—complicated.

Consider this example.[6] A volunteer in a local church offers to install a storm window on the church. It is the last window to be installed and, by coincidence, is on the very top story of the front of the church. The ground is sloped, the ladder is old, the window is large, and the volunteer is alone. On this particular windy Saturday, working many feet off the ground, the volunteer pushes the window (and himself) towards its space. As he does, the ladder moves, and he falls with it to the ground. The volunteer is severely injured. Who is in the wrong here?

A few more facts will muddy the water. The volunteer is a safety engineer at a power plant. He has taken safety courses and has years

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[2] California has removed the statute of limitations for certain claims of sexual abuse for one year. *See* CAL. CIV. PROC. CODE § 340.1 (West Supp. 2003).

[3] Kentucky and other states have attempted to strip religious bodies and their adherents of all privileges of confidentiality that normally (and constitutionally) apply to confessions of church members, if the communicant confesses sexual abuse. *See* Peter Smith, *Lawmaker Tracks Clergy Abuse Cases: Bill Would Unseal Abuser's Confessions* (Jan. 8, 2003), *at* http://www.courier-journal.com/localnews/2003/01/08/ke010803s345077.htm.

[4] As of January 2003, *The Boston Globe* has reported the files of 130 clergy accused of sexual abuse. *See* Michael Rezendes & Matt Carroll, *16 Priests Named for First Time in Sexual Abuse Lawsuits*, BOSTON GLOBE, Jan. 30, 2003, at B6, *available at* http://www.boston.com/globe/spotlight/abuse/stories4/013003_suits.htm.

[5] *See* Mark E. Chopko, *Emerging Liability Issues in Non-Profit Organisations: An Overview*, CHARITY L. & PRAC. REV. 17, 18 (2002) (U.K.).

[6] This hypothetical, which the author uses throughout this Article, is based on a real case, *Krider v. General Council on Finance & Administration*, Nos. 96-C-127, 96-C-165 (N.H. Super. Ct. Nov. 20, 1998). Information about this case was provided by the legal office of the General Council on Finance and Administration, Evanston, Illinois (on file with author).

of experience using ladders. He knows what he is doing and has violated every safety rule in the book. He tries to take his accident in stride. He returns to work and has received substantial personal assistance from members of his local church (they cook meals, they drive him to medical appointments, they offer to help with expenses, etc.). After all, he was helping his church. But, looking forward, he realizes that his own savings might not be enough to allow him to cope with future medical costs. He files suit. His lawyer studies the church structure and makes defendants of his local church, the ecclesiastical regional body in which the local church is located, and the national denominational body. The theory under which the ecclesiastical regional and national bodies were named is that both bodies occasionally offer workshops to local churches in risk management: "Someone should have instructed the local church to assure that all volunteers are well-trained before they are allowed to perform maintenance and certainly to use a spotter when a volunteer is working on a ladder." In fact, the local church did send members to attend a risk management workshop in which common accidents in local churches were covered, including falls, and there was an emphasis on training.

On the eve of trial, the volunteer dismissed his local church from the lawsuit. The case went to a jury, which returned a verdict in favor of the national body but against the regional body. Allocating the fault between the regional body and the volunteer, the volunteer received a verdict of $783,000. At some point in the deliberations, the jury must have concluded that the regional church was somehow the supervisor of the local church on property maintenance matters. Its liability derived from the actions, or more properly in this case the inactions, of the local church.

An important reason why litigants may seek some form of liability deriving from the actions of others turns on simple economics. It is relatively easy for a plaintiff to establish that a particular individual drove a vehicle negligently, or did not check to see what volunteers were up to, or made a poor business judgment or otherwise acted improperly. It is sometimes easier to establish this layer of liability than to establish the same kind of direct liability in an organization. Here, no one from the local church was checking on the activities of our claimant volunteer that Saturday. Because local churches depend on the willingness of members to volunteer for tasks to hold down the cost of operations and allow more funds for charity, the offer of a volunteer to install that last window would not be remarkable; it would be welcome. The local church might be the responsible defendant here. But like many local churches, this one doesn't have many funds

and there is still the reality that this church was very helpful to this injured member. So one looks for other possible defendants, more distant from the community with more assets, hence the naming of the regional and national bodies. If one of those entities can be forced to take responsibility for those actions committed by the member or the leaders of the local church as if they were its own, then financial recovery may be simpler.[7]

Yet a proper application of the body of law in this area shows that ultimate success against his regional church body should have been more problematic for this plaintiff. For courts trying to apply the law rather than an instinct for justice, the subtleties of the law can be deceptive. As shown below, liability depends on the nature of the conduct, its relationship to the community's mission, and the character of the organization's operations. The effort to find an organization liable in these kinds of situations is called, in some circles, "ascending liability." I believe the term "derivative liability" more accurately reflects the law and the litigation experience.[8] An extremely complex

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[7] *See* Samuels v. S. Baptist Hosp., 594 So. 2d 571, 574, 576 (La. Ct. App. 1992) (finding no abuse of discretion in jury award of $450,000 in damages against hospital and its insurance company for the actions of one of the hospital's employees).

[8] "Derivative liability" is more than (and includes) respondeat superior liability. It may even include ostensibly direct negligence claims that could not be asserted but for the negligence or misconduct of another. Derivative liability encompasses efforts to follow links in a denominational chain to impose responsibility in a coordinate or superior entity, not just an "employing" entity. Several important works address in complete detail the important facets of this topic. *See generally* EDWARD MCGLYNN GAFFNEY, JR. & PHILIP C. SORENSEN, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (Howard R. Griffin ed., 1984); Mark E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOC. 289 (1993) [hereinafter *Ascending Liability*]; Mark E. Chopko, *Derivative Liability*, *in* THE STRUCTURE OF AMERICAN CHURCHES: AN INQUIRY INTO THE IMPACT OF LEGAL STRUCTURES ON RELIGIOUS FREEDOM (Craig B. Mousin ed., forthcoming 2003) [hereinafter *Derivative Liability*]. Others would tend to distinguish solely between vicarious and direct liability. "Derivative liability" as used here includes that distinction but also applies in settings beyond traditional tort theories.

A thorough review of liability theory in various circumstances is found in 2 WILLIAM W. BASSETT, RELIGIOUS ORGANIZATIONS AND THE LAW, chs. 7–8 (2002) (Chapter 7 is entitled "The Churches in Court: Fundamentals in Litigation" and Chapter 8 is entitled "Specific Causes of Action for Personal Injury/Criminal Liability of Churches") and RICHARD R. HAMMAR, PASTOR, CHURCH & LAW, chs. 4, 10 (3d ed. 2000); *see also* Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1 (1986); David Frohlich, Note, *Will Courts Make Change for a Large Denomination?: Problems of Interpretation in an Agency Analysis in Which a Religious Denomination Is Involved in an Ascending Liability Tort Case*, 72 IOWA. L. REV. 1377 (1987). Given the space limitations of this Symposium Issue, I refer the reader to the above texts and concentrate here on a more narrow application of the legal theories by which religious institutions may properly be joined as defendants.

bundle of law and policy, "derivative liability" refers to the potential institutional responsibility that rests on, and is derived from, the actions of others.

This Article reviews the theories under which liability might attach to religious organizations for the actions of others, their employees or volunteers, or even the actions of related church entities.[9] It also examines selected areas of liability, attempting to distinguish between cases that may properly fall within accepted and ordinary liability theory and those which seem outside.[10] Finally, it offers some critique of the efforts to rewrite traditional tort law as applied to religious institutions.

I. Definitions and Background

In its broadest sense, liability follows responsibility. The goal of the claimant is to find some (solvent) defendant who can be forced to take legal responsibility for the harm. The goal of the defendant is to avoid the damages or, in multiparty cases, let the other defendants take responsibility. Liability law attempts to sort out these demands and ascertain fairly who should respond to the claim in damages. In litigation involving more complex organizations like religious organizations that have clustered together a variety of local, regional, and national entities, all flying the banner Catholic, or Lutheran, or Methodist, it is often the job of defense counsel to sort out the relationships to identify the "proper" defendant(s). "Derivative liability" is an attempt to describe how liability law works, and should work, in complex organizations. It provides a way for courts to navigate the turbulent waters of complex cases to a fair resolution.

In this most basic sense, derivative liability encompasses traditional tort policy concepts, both financial risk-spreading and social-reform goals. Indeed, social-reform and risk-spreading considerations are behind decisions in which one entity must answer for the actions of a related entity's minister, staff, or volunteer. This is more apparent in attempts to force liability on larger national or regional groups affiliated with smaller local groups. The courts presume that, if a "superior" body, however defined or connected, can be forced to take charge of the responsibility for the local matter, harm to future plaintiffs might be precluded. Thus, although this form of liability action has at its root the most basic litigation urge to find a solvent or in-

[9] *See infra* Part II.

[10] *See infra* Part III.

sured defendant, it also includes an element of social purpose, to enforce some greater responsibility through the liability system and deter future harm. The dilemma confronting the legal system is how best to allocate responsibility among the parties.

Conversely, where a litigant seeks to force a religious defendant to assume the legal responsibility for the misdeeds of a member, an employee, a leader, or even another part of the larger religious organization, the fact that all the entities bear a name of a religious faith does not make them all liable for the mistakes of everyone else. In an extreme example, a group of plaintiffs sued the Presbyterian Church (U.S.A.), a civil corporation, and its national assembly, an ecclesiastical body, for damages occurring in the sexual assault of the claimants by a minister who served in presbyteries (regional judicatories) in two states.[11] The theory of the case was that under the Book of Order, the actions of one Presbyterian are supposed to be the actions of all, a religious principle about solidarity and unity in the faith community.[12] In the hands of the plaintiffs' attorneys, the negligent acts of one were the negligence of all Presbyterians. The trial court clearly saw the case as an attempt to premise liability on a religious principle and dismissed through summary judgment on constitutional grounds.[13] The state supreme court affirmed but on the more narrow grounds that the national church bodies had no knowledge at all of the minister and under church rules would not be in a position to have done anything about it.[14] Dismissal was the proper remedy. To have done otherwise would have been to rewrite the polity.

Religious organizations organize themselves according to religious principle, vesting responsibilities in certain entities (a local church for property issues, a national church for doctrine), and not in others. Suing a local church over a doctrinal matter would be improper even if constitutional; suing a national church because someone fell through the roof of a parish church is likewise not proper in this example. Derivative liability describes how the law sorts out these

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[11] *See* N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 594–95, 597 (Okla. 1999). The defendants had initially filed this federal suit against the Presbyterian Church (U.S.A.), which is a corporation, and the assembly, which is not. When the court denied certification of a defendant class, the plaintiffs refiled the case against only the Presbyterian Church (U.S.A.), which plaintiffs identified in the caption as an unincorporated association because they were using it as a surrogate for all Presbyterian entities. *See id.* at 592.

[12] *See* Plaintiffs' Petition at pt. V, paras. I–K, N.H. v. Presbyterian Church (U.S.A.), No. CJ 97-7006-61 (Dist. Ct. Okla. County 1997) (citing the Book of Order).

[13] *See N.H.*, 998 P.2d at 597.

[14] *Id.* at 594, 598–601.

cases. It reflects a good measure of corporate law and constitutional principle.[15]

For some, to deny recovery based on immunity or corporate distinctions may seem artificial, unfair, or outdated. Religious entities, like their secular counterparts, however, need the assurance that "corporate" independence will be respected.[16] As my ladder example notes, religious entities, to a greater extent than secular entities, rely on the unbridled goodwill and good-faith efforts of volunteers to make their operations run. Occasionally these entities seek to structure their operations as separate civil units to guard against the possibility that another unit (or the whole body) might be made more vulnerable by the actions of an individual acting on its behalf or even alone. Having chosen to plan operations in a particular way following the dictates of the civil law, religious entities should not fear that these "corporate" structures will be imploded in litigation.[17]

When the individual actor who caused the damage was an agent or employee (for example, in general terms, a minister or volunteer) of a religious organization, there is inevitably an effort to pass the liability to the religious organization that, in the broadest sense, "employs" the individual. In that sense, the liability may be shifted to the institutional body. There may also be an effort to shift the liability to a coordinate or superior ecclesiastical entity. In one case, the plaintiff seeking damages for a personal injury sued the individual minister, the local church, the church school, the regional ecclesiastical authority, and the national and international bodies that were alleged to be responsible for the affairs of the religious organization.[18] In this case, the international organization and those who governed it were al-

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[15] *See generally* John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. Rev. 1061 (2003).

[16] *See* Plate v. St. Mary's Help of Christians Church, 520 N.W.2d 17, 19, 20–21 (Minn. Ct. App. 1994) (affirming decision indicating diocese not vicariously liable for actions of parish because parish was independent corporation).

[17] Such was the case in *Barr v. United Methodist Church* when a California court asserted jurisdiction over the association of entities referred to as the "United Methodist Church" for the obligations created by separately incorporated, but affiliated retirement homes. *See* 153 Cal. Rptr. 322, 324, 330–31 (Ct. App. 1979), *cert. denied*, 444 U.S. 973 (1979). That case was wrongly decided. *See* Hope Lutheran Church v. Chellew, 460 N.E.2d 1244, 1247, 1248–49 (Ind. Ct. App. 1984) (holding no agency relationship existed between committee formed to operate a retirement home and other Lutheran churches even though the churches played a role in creating the committee); *Ascending Liability*, *supra* note 8, at 341.

[18] *See* English v. Thorne, 676 F. Supp. 761, 761 (S.D. Miss. 1987). The literature abounds with other examples in other denominations. *E.g.*, Houston v. Mile High Adventist Acad., 846 F. Supp. 1449 (D. Colo. 1994) (naming regional and national entities as co-defendants); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996) (same).

leged to be ultimately responsible for an injury suffered at a local level.[19] It was up to the defendants to sort out the various layers of civil responsibility.

To that extent, the term "ascending liability" (as used by commentators)[20] most plainly denotes a hierarchical form of religious organization.[21] Authority and power are presumed to descend through the various layers of the organization to the individual adherent. Obedience is presumed to ascend through the organization with each individual adherent or intermediate group presumably acting at the behest of the next higher group in the organization. Ultimately, such authority presumably resides in a religious superior or entity at the top of the organizational chart. Using the "ladder" case as an example, the duty to control the actions of the local church was alleged to ascend through the hierarchical structure resting ultimately with the national denominational leaders.

Indeed, civil responsibility does follow the discipline of ecclesial principle through the various layers of the organization, but not haphazardly or according to the pleadings of a claimant who may plead a polity or a set of relationships that describe the church along lines favorable to the claimed liability. In fact, as shown below, unless one wants to violate both corporate and constitutional law, liability should reside, if at all, in that entity which has both the juridic power (under the polity of the religious organization) and the civil duty to answer for the actions of individuals or organizations at a lower level in the hierarchy.

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[19] *English*, 676 F. Supp. at 762, 764 (dismissing for lack of subject matter jurisdiction a claim that Vatican officials should answer for alleged abuse by a local priest); *see also* Package v. Holy See, No. 86-C-222 (N.H. Super. Ct. Nov. 30, 1988) (concluding Vatican officials not responsible for hazard created by member of monastic community; leader of faith community does not select followers). Additional cases are discussed in Parts II and III, *infra*.

[20] The term "ascending liability" appears in one reported decision, MacDonald v. Maxwell, 655 N.E.2d 1249, 1250 n.1 (Ind. Ct. App. 1995). The term appears in cites to both GAFFNEY & SORENSON, *supra* note 8 and *Ascending Liability*, *supra* note 8. *Id.*

[21] Religious entities tend to fall into two dominant types—"hierarchical" or "congregational." Congregational bodies are fairly autonomous, self-governing local entities. 1 BASSETT, *supra* note 8, ch. 3, § 3:3. They select or elect ministers and conduct their own affairs with respect to doctrine and to worldly affairs with a high degree of independence. *See id.* Hierarchical bodies are governed through "clerical" superiors, set in authority, over others. *See id.* A form of polity between the two is sometimes called "connectional" or "presbyterial." *Id.* In that form, local congregations are autonomous, but are affiliated through regional or national groupings with a denominational identity. *See id.*; *see also* Guinn v. Church of Christ, 775 P.2d 766, 771–72 n.18 (Okla. 1989) (citing other authorities).

This principle is also seen in litigation targeting related religious corporate entities and ecclesiastical "coordinates" in congregational or connectional polities. For example, in one instance the organizing religious body was found liable for the unpaid bills of a senior citizen center on the grounds that the superintendent of the center was the agent of the religious entity.[22] These claims do not concern "superior," but "coordinate" religious organizations for the actions of separate civil (even secular-appearing) corporations. Responsibility may shift from one corporate entity to another even though they are in a more "horizontal" relationship than entities in a hierarchical polity. Yet the litigation effort to shift responsibility from one level to another in a congregational body has all the trappings of litigation involving layers of a hierarchical body and, for this reason, appears with cases in which liability "ascends" or "descends," under the heading "derivative liability."

Derivative liability applies in diverse factual settings involving all forms of religious polity.[23] Although most easily illustrated in tort cases, for completeness, it should be noted that attempts to shift responsibility to another layer in the religious organization is seen in cases involving the contracts or debts of its agents or employees, the fraud or intentional misconduct (even crimes) committed by agents or employees, and the actions of ministers in full accord with religious doctrine. Furthermore, although the doctrine is most easily illustrated by reference to incorporated religious bodies, following the various ecclesial links in a civil corporate chain, it is also seen in efforts to hold unincorporated religious associations, for the most part congregational churches or synagogues, responsible for the conduct of a member, staff or cleric, or agent. Indeed, changes in the statutory treatment of unincorporated associations make it easier for these entities to sue or be sued in their own name.[24] Therefore, it is easier for

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[22] *See* Crest Chimney Cleaning Co. v. Ali Ezer Congregation, 310 N.Y.S.2d 217, 225–27 (Civ. Ct. 1970); *see also* Ruffin v. Temple Church of God in Christ, Inc., 749 A.2d 719, 722–23 (D.C. 2000) (holding jury could reasonably conclude pastor had authority to enter church into a contract).

[23] There are even efforts to pierce the corporate veil to find adequate compensation in particular cases. *See* Edward McGlynn Gaffney, Jr., *Piercing the Veil of Religious Organizations* 1, 15 (paper presented at the ABA National Institute on Tort and Religion June 15, 1990) (noting this form of litigation as example of derivative liability).

[24] *See* Hanson v. St. Luke's United Methodist Church, 704 N.E.2d 1020, 1021, 1024–27 (Ind. 1998); Crocker v. Barr, 409 S.E.2d 368, 370–71 (S.C. 1991); Cox v. Thee Evergreen Church, 836 S.W.2d 167, 168–69, 173 (Tex. 1992). These cases note state statutory changes to allow litigation by or against unincorporated associations, among other things, to re-

plaintiffs to have a defendant that is statutorily able to take responsibility for the actions of individuals alleged to act in its name.

II. Principles Governing the Imposition of Responsibility[25]

From the study of models of different church organizations, whether incorporated or unincorporated, hierarchical or congregational, and the legal opinions governing liability, certain principles emerge that unify a divergent and complex body of law. Cutting across polities and corporate forms and governing the imposition of responsibility (in the broadest sense), these principles describe the circumstances under which liability may be shifted. Although the law does not always admit of clarity, three general lines of inquiry appear, and liability will not be imposed absent an affirmative finding that the religious organization has exercised at least one of the following levels of responsibility over the matter being litigated.

These three principles for the imposition of responsibility are:

1. Statutory or Corporate Responsibility (the civil organizing or operational documents expressly place responsibility for the matter disputed in a particular inferior, superior, or coordinate group);
2. Denominational Responsibility (the ecclesial discipline of the body expressly places responsibility in, or denies it to, a particular group within the body); and
3. Situational Responsibility (notwithstanding the above principles, a particular group has specifically involved itself in the underlying dispute or transaction giving rise to the litigation).

Whether liability is ultimately proved such that the organization must pay for the damage is a question which goes to the merits. Given the high incidence of settlement, merely allowing the lawsuit to proceed may cause an organization to make the prudential judgment to resolve a claim rather than either risk an adverse decision or expend its resources in a defense. Thus, consideration of these principles under which a claim for derivative liability may be stated is very important

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move a bar to member lawsuits (known as the doctrine of imputed negligence). *See Crocker*, 409 S.E.2d at 370–371; *Cox*, 836 S.W.2d at 168–69, 173.

[25] Portions of this Part also appear in *Ascending Liability*, *supra* note 8, at pages 299–309.

for the ultimate resolution of a liability claim. This Part deals with each of these areas in turn.

A. *Statutory or Corporate Responsibility*

Through its civil (as opposed to ecclesial) governing documents, articles of incorporation or bylaws, policy or personnel manuals, or similar documents, the coordinate or superior body may be held to answer for claims if it has reserved to itself the authority over the matter in contention. Often this question is resolved under state statutory or common law. In 1924, in *Roman Catholic Archbishop v. Industrial Accident Commission*, the California Supreme Court held that the "Archbishop of San Francisco, a Corporation Sole" was responsible for workers' compensation claims of tradesmen injured on parish property.[26] A responsibility of the corporation sole was to hold title to real property of the religious body.[27] In the opinion of the California Supreme Court, this responsibility included the necessary power to make arrangements for its maintenance and repair, such that the action of an individual pastor was attributable to the corporation.[28] The corporation was estopped from denying its ultimate responsibility for such matters.[29] The court viewed its holding as an unremarkable application of the California law authorizing religious corporations.[30]

Conversely, where there is no legal basis to impute the matter in dispute to the power and authority of the corporation, the corporation may be dismissed from an action. For example, in an action which sought damages for a sexual assault, a corporation sole, organized under the laws of Rhode Island, was dismissed through summary judgment.[31] Plaintiffs had contended that the bishop conducted all priestly supervision through the corporation sole and therefore the corporation sole (which also presumably held the assets) should be responsible for the control and direction of the negligent priest.[32] The bishop responded that under the 1900 legislation that allowed

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[26] 230 P. 1, 1–2, 8 (Cal. 1924).

[27] *See id.* at 8.

[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] Doe v. O'Connell, No. PC 86-0077, 1989 WL 1110566, at *1 (R.I. Super. Ct. Nov. 21, 1989).

[32] *See id.*; *see also* EEOC v. St. Francis Xavier Parochial Sch., 77 F. Supp. 2d 71, 75, 78 (D.D.C. 1999) (setting forth that parish, as part of corporation sole, lacked legal capacity to be sued).

the creation of a corporation sole, the legislature provided that the corporation sole had no ability to control or supervise the functioning of the individual priests.[33] Rather, as a creature of state law, the corporation sole had specifically limited powers relating to the purchase, holding, and conveyance of property for religious purposes.[34] The court agreed,[35] and dismissed the corporation from the litigation through summary judgment.[36]

Although more easily illustrated by reference to large hierarchical religious bodies organized along corporate lines, the same result is seen in litigation involving single congregations. For example, in a case arising in congregational polity, a court rejected a writ of execution against real property held by a person, not as an individual, but in his capacity as "presiding apostle" of a church, a corporation sole.[37] The appellate court indicated that the assets of the corporation sole are not the "personal assets of its titular head," and therefore could not be used to satisfy personal debts.[38] Even in these polities the courts distinguish between personal/ecclesial and civil/corporate powers.

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[33] *See O'Connell*, 1989 WL 1110566, at *1.

[34] *Id.*

[35] *See id.* at *1, 3. To the same effect is *Plate v. St. Mary's Help of Christians Church*. *See* 520 N.W.2d 17, 19, 20–21 (Minn. Ct. App. 1994). In that case, the court affirmed dismissal, through directed verdict, of a diocesan corporation from a wrongful death case holding that the action complained of was vested by corporate form in a separate entity, the local parish church. *See id.* at 18, 20–21. In the secular world, related but separate entities rely on separate incorporation to limit liability, and courts do not look behind them except for compelling and narrowly restricted reasons. *E.g.*, Tatum v. Everhart, 954 F. Supp. 225, 228–30 (D. Kan. 1997) (concluding mere membership in United Way was insufficient to create single employer for Title VII liability purposes). The same result should occur in the case of religious entities. Black v. Cardinal McCloskey Children's & Family Servs., No. 17865-96 (N.Y. Sup. Ct. May 11, 2000) (concluding legally related but separate entity was not liable for other's tort).

[36] *O'Connell*, 1989 WL 1110566, at *1. The court relied on cases from other jurisdictions reaching the same conclusion on other facts in both the tort and the contract area. *See id.* at *2–3. Among the cases relied upon is *Roman Catholic Archbishop v. Superior Court*. *See* 93 Cal. Rptr. 338, 340, 341–42 (Ct. App. 1971) (determining contract for purchase of St. Bernard dog with Swiss Abbey not enforceable against Archbishop of San Francisco; Catholic organizations are separate civil entities).

[37] County of San Luis Obispo v. Ashurst, 194 Cal. Rptr. 5, 5 (Ct. App. 1983).

[38] *Id.* at 6, 8. A Canadian case recently reached the same conclusion holding that a bishop was not personally liable for the mistakes of a predecessor but the corporation sole might be. Doe v. Bennett (2002), 215 Nfld. & P.E.I.R. 310 at para. 9 (Nfld. S.C. (C.A.)), 2002 NFCA 47, leave to appeal to S.C.C. granted, [2003] WL 13731 (WL).

B. *Denominational Responsibility*

Denominational responsibility has as its starting point whether, in ecclesial documents or expressions of authority, the coordinate or superior body proposed as a defendant has reserved authority over the matter in dispute to itself. In other words, does the entity reserve to itself the authority to supervise or resolve the particular matter at the center of the dispute? Ecclesiastical control is not always identical to civil control, meaning that the control exercised by the related religious entity rests on the consent or adherence of the other person or entity to religious doctrine. Although the judicial development of this principle involves courts in the close scrutiny of discipline of the body itself, often this scrutiny is invited by the religious entity which has pleaded its governing ecclesial documents as a means to avoid ultimate responsibility for the matter in dispute. Courts here walk a fine constitutional line.

Illustrating this principle is *Eckler v. General Council of the Assemblies of God*.[39] In this case, in 1990, the Court of Appeals of Texas ruled that regional and national church bodies were not liable to answer in tort for damages resulting from the actions of a minister teaching at a school operated by a local church affiliated with the denomination.[40] No relationship existed between the local church and the denomination's General Council under the church's organizational structure sufficient to warrant the imposition of liability.[41] The constitution and bylaws of the denomination itself gave a District Council (an intermediate structure) the responsibility for the selection and endorsement of prospective ministers.[42] Those documents also gave the authority to investigate, file charges, and conduct hearings on alleged allegations of misconduct to the District Council.[43] Because each individual local church was self-governing, the General Council of the Assemblies of God had no civil duty, based on an asserted ecclesial right, to supervise or control their internal affairs.[44] Even though the General Council would ordain and license ministers, their actual supervision would be in the hands of local churches or, at most, a District Coun-

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[39] 784 S.W.2d 935 (Tex. App. 1990).

[40] *See id.* at 936–37, 939–41.

[41] *See id.* at 938–41.

[42] *Id.* at 938.

[43] *See id.* at 938–39; *see also* Doe v. Cunningham, 30 F.3d 879, 883–84 (7th Cir. 1994) (concluding undisputed facts showed clergy supervision was vested in church body not named in litigation).

[44] *See Eckler*, 784 S.W.2d at 941.

cil.[45] Indeed, when a complaint is made about ministerial misconduct, the complaint is referred to the appropriate District Council rather than the General Council for investigation and disciplinary action.[46] Liability for failure to take disciplinary actions creating a risk of future misconduct would follow the denomination's decision to vest such responsibility in a particular entity, and not be spread throughout the denomination generally or its national institution.[47]

In 1999, in *N.H. v. Presbyterian Church (U.S.A.)*, the Oklahoma Supreme Court resolved a dispute about the authority of the national body of the Presbyterian Church to have responsibility for the misconduct of individual ministers on the basis of the absence of knowledge in the national body.[48] It might also have resolved the case according to the principle that the power to supervise and discipline Presbyterian ministers resided in the first instance with the regional bodies, the presbyteries. To have held that the national body had powers beyond its charter and the Church's Book of Order would have been incorrect and unconstitutional.

Churches fix the authority or lack thereof for specific tasks in particular church entities. It is well settled that the power to engage in this kind of self-governance is beyond the constitutional power of the civil courts and authorities.[49] If the state lacks the authority to dictate how a religion is organized and governed, it follows that the courts may not allow a claim to proceed on the false or erroneous assertion of ecclesiastical power in some body, or on the notion that some religious doctrine "must" provide for this kind of claim.[50] For example, if a party pleaded that the Catholic Church was a corporate monolith, or even a General Motors, and attempted to fix liability for a particular harm occurring in one local church on the whole faith community, that set of facts is subject to attack and the claim subject to dismissal as unconstitutional. There is no rule that requires false facts to be taken as true on a motion to dismiss when the consequence is allowing for an unconstitutional assertion of judicial power over a fictitious relig-

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[45] *See id.* at 938.

[46] *See id.*

[47] *See* Evan F. v. Hughson United Methodist Church, 10 Cal. Rptr. 2d 748, 758 (Ct. App. 1992) (concluding regional body not liable for misconduct because local body possessed hiring authority); Dewaard v. United Methodist Church, 793 So. 2d 1038, 1040–41 (Fla. Dist. Ct. App. 2001) (concluding regional body liable for supervision, local church dismissed).

[48] *See* 998 P.2d 592, 594, 600–01 (Okla. 1999).

[49] Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952).

[50] *See id.*

ious polity. On the contrary, in 2002, in *Hiles v. Episcopal Diocese*, the Massachusetts Supreme Judicial Court held that the propriety of such constitutional assertions should be raised on motions to dismiss with the burden of proof shifting to plaintiffs.[51] Otherwise, a religious organization's constitutional right to self-governance could easily be violated.[52]

Conversely, where polities do place the denominational responsibility or supervision in the hands of a larger regional or other governing body, liability may attach to this body. For example, in *Olson v. Magnuson*, the Evangelical Covenant Church of America, an Illinois corporation, was named as a defendant in a complaint for its alleged failure to supervise adequately one of its ministers serving at an affiliated church in Minnesota.[53] The national church body unsuccessfully moved to dismiss the case for lack of personal jurisdiction.[54] On appeal the appellate court noted that the bylaws of the national church specifically provided for the formation of a "board of ministry" to supervise the conduct of, license, investigate, and discipline its ministers.[55] Because the national church had held itself responsible for investigating claims of impropriety lodged against local church ministers and administering any discipline, the court found, from the church's own rules and regulations, that the national church body should be held to answer for the claimed misconduct.[56] Although par-

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[51] 773 N.E.2d 929, 938 (Mass. 2002).

[52] The problem of proof in these cases is delicate. Often it is the religious body that offers evidence of its religious doctrine as proof that it lacks the claimed responsibility over the subject matter of the lawsuit. Such disputes should be resolved in limine, with the benefit of the doubt going to the religious body. If there is a legitimate doubt in the court's mind, then resort should be made to existing mechanisms within the church body to resolve the claim. It should be emphasized that, if a court is so heavily invested in deciding the legitimacy of a claim by attempting to resolve a dispute among trained experts in the law, practice and polity of a religion, serious questions must exist as to the constitutionality of the claim in the first instance.

[53] 457 N.W.2d 394, 395 (Minn. Ct. App. 1990). In one of six cases arising from the misconduct of Reverend Magnuson, a jury returned a verdict in excess of $1 million; $200,000 against Rev. Magnuson and nearly $900,000 against the local church. *See* NAT'L L.J., June 14, 1993, at 6. The report does not say what occurred with respect to the national body. *See id.*

[54] *Olson*, 457 N.W.2d at 395.

[55] *Id.*

[56] *See id.* at 397. The court also concluded, however (in implicit accord with *Eckler*, 784 S.W.2d at 937) that mere membership in a national religious organization was not enough to confer jurisdiction over that national group to answer for a tort committed in a local church. *See id.*; *see also* Glover v. Boy Scouts of Am., 923 P.2d 1383, 1384, 1387–88 (Utah 1996) (concluding that issuing of guidelines and suggestions by the national association and local council did not amount to control over the day-to-day activities of the local

ticular constitutional considerations need to be evaluated in these circumstances,[57] generally the religious entity itself has invited a court to consider its governing documents to avoid responsibility.

The mere potential to exercise ecclesial discipline is not sufficient to impose liability. The governing body must either assert or reserve authority over the particular matter in question. For example, to assert liability against a church for a deliberate personal injury committed by a minister, it is not enough that the church has exercised general ecclesial discipline or offered some general statements of concern. There must be some connection between the particular expression of ecclesial discipline and the particular matter in dispute.[58] The mere right to control conduct generally for ecclesiastical

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group). Something more than a potential interest or authority must be shown. *See* Nye v. Kemp, 646 N.E.2d 262, 264–65 (Ohio Ct. App. 1994). Similarly, ecclesiastical supervisory authority can have civil law consequences when it is expressly reserved. *See* Does v. CompCare, Inc., 763 P.2d 1237, 1241–44 (Wash. Ct. App. 1988). In *Does v. CompCare, Inc.* a Catholic bishop in Louisiana was held answerable to a claim for damages in Washington because he continued to exercise ecclesial discipline over a suspended priest who was then in residence in Washington. *See id.* at 1239, 1243–44. The continued denominational relationship between the bishop and the priest provided sufficient links such that jurisdiction could be fairly asserted. *See id.* at 1241–44; *see also* Johnston v. United Presbyterian Church in the United States, Inc., 431 N.E.2d 1275, 1280 (Ill. App. Ct. 1981) (holding Church had sufficient control over relationship at local level to meet personal jurisdiction requirement).

[57] The possibility of scrutiny of internal matters always raises the prospect of unconstitutional entanglement. *See* Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich, 426 U.S. 696, 708–09 (1976). It would also invite a court to scrutinize standards, policies, and actions (or the lack thereof) in violation of free exercise rights. *See* Hadnot v. Shaw, 826 P.2d 978, 987–88 (Okla. 1992) (setting forth that free exercise also protects church autonomy in tort litigation). For this reason, courts usually determine polity-dependent questions if they can be answered without intrusion. *See* Werling v. Grace Evangelical Lutheran Church, 487 N.E.2d 990, 992 (Ill. App. Ct. 1985). Courts routinely forbid litigation over internal religious matters and bar the civil enforcement of religious duties. *See* Phillips v. Marist Soc'y, 80 F.3d 274, 275 (8th Cir. 1996); Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 203, 205–06 (Utah 2001). But there is no constitutional barrier to a court making an inquiry and a determination of the authority (or more likely, the lack of authority) in a religious entity, when invited by that entity on a motion to dismiss. Rashedi v. Gen. Bd. of Church of the Nazarene, 54 P.3d 349, 352, 353, 354–55 (Ariz. Ct. App. 2002) (remanding for fact finding because manuals unclear as to division of responsibility).

[58] For example, in *Malloy v. Fong*, the California Supreme Court held a regional presbytery liable for personal injuries suffered in a car accident at a local mission church. 232 P.2d 241, 245, 255 (Cal. 1951). The presbytery had asserted the actions of the local church ministers were beyond their supervision. *See id.* at 245. But relying on ecclesial documents the court rejected that proposed limitation, noting that in the Presbyterian Church, presbyteries enjoyed a higher degree of direct supervision in a mission church than in a fully functioning (and therefore autonomous) congregation. *See id.* at 248–49. Because the

purposes does not make a religious body civilly responsible for all of the actions of any person related to it. As one court explained: "If ecclesiastic control is to be sufficient, the Holy See would be exposed to limitless liability for any tortious acts by individuals who choose to commit themselves to the church's religious calling."[59] Should ecclesiastical direction be manifest in the actions of the individual, there is little doubt under the principles established above that a higher ecclesial body would at least be held to answer in such a case in order to discern whether in fact it was negligent.

C. *Situational Responsibility*

The third principle for the imposition of responsibility shows that liability may be asserted even in the absence of secular statutory or corporate responsibility over the matter in question, and in the absence of denominational authority to resolve the matter being litigated. The actual conduct of an organization can cause it to become involved situationally in the matter in review. For charitable institutions occupied with righting wrongs and doing justice, the temptation to become involved in the affairs of some related part of the religious organization, notwithstanding the lack of civil or ecclesial authority to do so, is sometimes too great to bear.

For example, in 1990, in *Eckler*,[60] the Court of Appeals of Texas scrutinized the record to ascertain whether, notwithstanding the limitations in the governing documents, the General Council had involved itself in the situation sufficiently so as to be fairly subject to suit.[61] In this case the court found no record that the General Council even knew that a complaint had been made against the local minister.[62] The record also established, without dispute, that had the Gen-

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church placed that control in the presbytery, the presbytery was the proper defendant. *See id.*

[59] Package v. Holy See, No. 86-C-222, slip op. at 6 (N.H. Super. Ct. Nov. 30, 1988). In fact, the court found that, notwithstanding ecclesiastical law, the religious body really does not "have the opportunity to control [their followers'] acts so as to prevent harm to others." *Id.* at 6–7. In *Package*, plaintiffs sued the international governing body for Catholics to compensate them for an automobile accident caused by the action of one individual monk. *Id.* at 6; *accord* M.L. v. Civil Air Patrol, 806 F. Supp. 845, 848–49 (E.D. Mo. 1992) (national entity not responsible for personnel decision at local level); *N.H.*, 998 P.2d at 600–01 (holding national organization not liable because it did not have knowledge of the acts of the minister); *see Plate*, 520 N.W.2d at 20–21 (concluding diocese not responsible for actions of parish, which was separate corporation).

[60] *See supra* notes 39–47 and accompanying text.

[61] *See* 784 S.W.2d at 938–39.

[62] *See id.*

eral Council become aware of such a complaint made against the local minister, the matter would have been referred to the District Council for resolution.[63] Thus, the case implies situational responsibility as a separate governing principle for the assertion of derivative liability. When justified by the record, courts specifically determine whether a coordinate or superior body has so insinuated itself in a particular set of actions in the related entity that it can rightly be held in the given case as a defendant and therefore risk ultimate liability.

Conversely, even where an organization has insinuated itself into a situation, its liability is dependent on the liability of its agents. For example, where a religious organization has engaged itself in the placement of children for foster care and ultimate adoption, its liability for damages for injuries arising out of these placements derives from the actions of the individuals with whom children were placed. In 1989, in *LDS Social Service Corp. v. Richins*, the Georgia Court of Appeals held that the religious corporation was not liable, as a matter of law, where no liability had been found in the actions of the foster parents who had oversight of the child when the child was injured.[64] This principle should be understood as a rule of caution. When no statutory or denominational basis on which liability may fairly shift otherwise exists, a court may nonetheless seek just results in particular cases by scrutinizing the underlying transaction for actual involvement, not in the general subject matter, but in the specific situation that is the subject of the complaint.

The above liability principles—statutory/corporate responsibility, denominational responsibility, and situational responsibility—are not mutually exclusive. Each functions in the alternative, though an affirmative answer on any one level of inquiry can be enough to hold a defendant in a case. As illustrated above, these principles cut across denominational, corporate, organizational, and polity lines. Illustra-

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[63] *See id.* at 938; *see also* Doe v. New London Ass'n of the United Church of Christ, No. CV990551181S, 2001 WL 83883 at *2 (Conn. Super Ct. Jan. 12, 2001) (finding no legal duty owed to parishioner by Association); *Evan F.*, 10 Cal. Rptr. 2d at 836–37 (holding negligent hiring does not carry over to those who are a step removed, i.e., those who are victims of the victim of the negligently hired employee); Konkle v. Henson, 672 N.E.2d 450, 461 (Ind. Ct. App. 1996) (holding summary judgment for defendant proper on grounds that procedure by which international church could have acted not invoked).

[64] *See* 382 S.E.2d 607, 611 (Ga. Ct. App. 1989); *see also* Osborne v. Payne, 31 S.W.3d 911 (Ky. 2000) (affirming grant of summary judgment for diocese because no evidence was presented that priest had a history of misconduct or that diocese had knowledge that priest might engage in sexual misconduct, and therefore there was no support for an independent negligence claim).

tions of how these principles apply in given situations are discussed in the next Part.

III. Applications

Examining how the above principles apply in decided tort cases shows that most courts in fact reach decisions consistent with them. Although religious institutions must also be measured by what the U.S. Constitution permits, there is no general barrier to the adjudication of tort claims through the First Amendment.[65] In each area of law that follows, these principles make for order and the hobgoblin, consistency, in the chaotic world of torts.

Under the doctrine of respondeat superior an employer or master is liable for the torts committed by employees or agents within the scope of their duties. For liability to shift (in those cases not involving direct negligence), the plaintiff must prove both aspects of a two-part test. First, the person who committed the tort must be found to be the agent, employee, or servant in a relationship with the religious organization. Even if a relationship can be established, without negligence in the actor, no derivative organizational responsibility can be placed.[66] Second, the activity in question must be determined to be within the scope of duties the person was to perform, or a foreseeable consequence of that person's normal activities in the task. As liability is asserted to higher or coordinate bodies, the principles articulated in Part II above are employed. Torts are claimed for actions which are sometimes contrary to religious doctrine,[67] sometimes in accord with religious doctrine,[68] and sometimes on which religious doctrine has no bearing.[69]

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[65] Rashedi v. Gen. Bd. of Church of the Nazarene, 54 P.3d 349, 352–53 (Ariz. Ct. App. 2002).

[66] *See* LDS Soc. Serv. Corp. v. Richins, 382 S.E.2d 607, 611 (Ga. Ct. App. 1989); *see also* Schieffer v. Catholic Archdiocese, 508 N.W.2d 907, 913 (Neb. 1993) (finding no direct negligence in a corporate defendant without negligence on the part of the individual cleric).

[67] *See* Marco C. v. Roman Catholic Bishop, 5 Civ. No. F3610 (Cal. Ct. App. Mar. 29, 1985) (sexual assault).

[68] *See* Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 876 (9th Cir. 1987) (shunning).

[69] *See* Ambrosio v. Price, 495 F. Supp. 381, 383 (D. Neb. 1979) (automobile accident).

A. *Accident Cases*

The process by which one assesses responsibility for an accident involving a volunteer or employee of a religious body is normally straightforward. For example, if a staff member driving a church vehicle causes an accident on the way to or from a field trip, or a custodian fails to correct hazardous conditions on or near the property, the employing entity, even though a church, may be responsible. Such cases turn on a policy determination that the employee or supervising entity, even though a religious organization, has not only the opportunity, but the duty, to address hazardous conditions and address them properly.[70]

The complicating features in this area of the law occur when liability is asserted against related church entities. For example, in the ladder case noted above, the original defendants included the local church and regional and national judicatories. In maintenance-of-property cases or control-of-volunteer cases, the primary focus, in fact, is the local church entities. Neither regional nor national bodies have an opportunity, much less the right, to control the actions of individual volunteers doing specific maintenance tasks of local churches. The verdict against the regional body, however much motivated out of the sense of justice or concern for the volunteer injured, cannot be sustained by any analysis under ordinary derivative liability principles, unless the regional body maintained some form of direct control over the use and maintenance of property or insinuated itself into local property matters.[71] It is unclear whether the volunteer in question even could have received compensation from his local church.[72]

A case raising similar concerns was reversed on appeal.[73] A jury had found that a regional ecclesiastical body was the supervisor of a local Episcopal church and ultimately responsible for damages caused by a vestryman who injured his own son while performing voluntary

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[70] *See, e.g.*, John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 953–55 (Cal. 1989).

[71] But see *Roman Catholic Archbishop v. Industrial Accident Commission* where the property managing entity that was held liable was the regional judicatory corporation sole. *See* 230 P. 1, 2, 8 (Cal. 1924).

[72] Fisher v. Northmoor United Methodist Church, 679 S.W.2d 305, 306–07 (Mo. Ct. App. 1984) (finding church had no duty to warn invitee doing volunteer work where volunteer helped create the dangerous condition). *See* Cottam v. First Baptist Church, 756 F. Supp. 1433, 1438–39 (D. Colo. 1991) (indicating no liability in local church when volunteers act gratuitously and outside the control of the church), *aff'd*, 962 F.2d 17 (10th Cir. 1992).

[73] *See* Folwell v. Bernard, 477 So. 2d 1060, 1062–63 (Fla. Dist. Ct. App. 1985).

gardening work for his own local church community.[74] The jury found the negligence of both the volunteer and the local church could be attributed to the Episcopal diocese.[75] The District Court of Appeal reversed, holding that the diocesan church, through denominational documents as well as civil statutes, exercised neither civil nor ecclesiastical control over the local church in the area of property maintenance to allow for an assertion of an agency relationship.[76] The temporal affairs of the local church, including the maintenance of property, were in the hands of the local church, which alone was responsible for the actions and negligence of its employees and volunteers.[77] Reviewing the record, the appellate court determined that the diocese had not insinuated itself into the conduct of maintenance activities of the local church such that the imposition of liability could be justified.[78] The jury verdict was set aside.[79]

Another issue which continues to occur from time to time is the doctrine that some have termed "canonical agency." Under this doctrine, every activity of a member of the clergy, all day, every day, is attributable to his or her ecclesiastical superior.[80] Without deciding

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[74] *See id.* at 1061–62.

[75] *See id.* at 1062.

[76] *See id.* at 1063.

[77] *See id.*; *see also* Nye v. Kemp, 646 N.E.2d 262, 264–65 (Ohio Ct. App. 1994) (finding regional body not liable because of lack of control). The assertion of control becomes indefensible when one sues the national or international governing body of a religious organization alleging that those in charge are responsible in tort for the carelessness of individual members or ministers. The heads of these organizations do not choose their members (the members choose the organizations for doctrine, practices, and a variety of other reasons) and rarely do those in charge pass on the ministry credentials of each individual performing services around the globe. *Compare* Olson v. Magnuson, 457 N.W.2d 394, 397 (Minn. Ct. App. 1990), *with* Package v. Holy See, No. 86-C-222, slip op. at 5–7 (N.H. Super. Ct. Nov. 30, 1988).

[78] *See Folwell*, 477 So. 2d at 1063. A state appellate court in *Doe v. Roman Catholic Church* listed factors that could be evaluated to determine if a charity volunteer was acting gratuitously or subject to sufficient direction to be considered an agent of the religious entity. *See* 615 So. 2d 410, 415 (La. Ct. App. 1993). "The right to control is a fact question, determined by the following questions: (1) the degree of contact between the charity and the volunteer, (2) the degree to which the charity orders the volunteer to perform specific actions, and (3) the structural hierarchy of the charity." *Id.* The court in *Roman Catholic Church* found that, had the jury been properly instructed, it might have concluded that the leader of the youth organization was not a servant of the church. *Id.* at 412, 415.

[79] *See Folwell*, 477 So. 2d at 1063.

[80] *See* Stevens v. Roman Catholic Bishop, 123 Cal. Rptr. 171, 175–77 (Ct. App. 1975). Each of the experts who were divided over whether such a form of agency was possible has earned his own place in the life of the law and the Catholic Church in California. Plaintiff's expert was John Noonan, now Judge of the U.S. Ninth Circuit Court of Appeals, and the defense expert was Roger Mahony, now Cardinal Archbishop of Los Angeles. For me,

whether such a claim of agency is constitutionally proper, most courts have routinely rejected such a broad notion of agency as inconsistent with the general law of the jurisdiction. As stated by the Kansas Supreme Court, if a person is conducting his business through others, "he is bound to manage them so third persons are not injured."[81] This rule is therefore "'a rule of policy, a deliberate allocation of a risk.'"[82] Although a religious leader may have substantial ecclesiastical control over the comings and goings of individual ministers, that control does not include all day-to-day activities of the minister, such as whom he might visit and when.[83]

B. *Misconduct Cases*

Abuse of minors and the exploitation of vulnerable adult counselees are two of the more difficult areas of liability for religious entities. These actions are rightly condemned as possibly criminal (depending on the age of the victim), possibly creating liability (depending on whether the person legally could give consent) but always sinful and wrong. The areas of liability generally do not involve respondeat superior liability, as almost every court holds, correctly, that a sexual assault is not part of the expected duties of a minister or other person serving a religious entity. There are a variety of theories in which liability is asserted against a religious entity, or even against a series of related entities, sounding in negligence, however: hiring, retention, supervision, and fiduciary duty. These liability theories occasionally flirt with the constitutional boundary between church and state when the evidence on which the claim depends is a religious doctrine or principle, or when the claim involves the courts in critiquing policies or doctrine rooted in religious values or teaching, or when a secular yardstick is proposed by which to measure the activities of religious leaders.

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the issue is why the court allowed the battle of canonical experts over the degree of supervision a bishop had over the social activities of an individual priest and why the issue was not dealt with in limine, possibly through reference to Catholic Church agencies, to resolve that question definitively.

[81] Brillhart v. Scheier, 758 P.2d 219, 221 (Kan. 1988).

[82] *Id.* at 222 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984)).

[83] *See Brillhart*, 758 P.2d at 223; *Nye*, 646 N.E.2d at 264; Glover v. Boy Scouts of Am., 923 P.2d 1383, 1388 (Utah 1996).

1. Is There Clergy Malpractice?

The short answer is "no." The longer answer engages the question of the appropriate role of courts and the relationships that exist between ecclesial defendants.

Courts have universally rejected claims of clergy malpractice.[84] One cannot sue a minister for failing to discharge duties defined by church law, doctrine, or practice. For example, one cannot sue a minister for bad sermons, poor counsel, poorly-led worship, or a misinterpretation of scripture, because the criteria by which one judges a minister's sermon, counsel, liturgical skills, or scriptural interpretation are decidedly religious and ecclesial, and hence outside the constitutional orbit of government. For the government to impose special duties on persons simply by virtue of their ministerial or ecclesial status would amount to a special disability on religion, a targeting of religion for disadvantageous treatment, which is constitutionally impermissible.[85] Just as the government cannot *establish* the qualifications of ministers,[86] it cannot *enforce* ministerial qualifications by providing a remedy when ministers fall short of them. It makes no difference whether the creation and enforcement of ecclesial or ministerial duties is attempted by a legislature or by a court, for the First Amendment operates as a limitation on all of government, not just on one branch.[87]

The constitutional issues at stake here are clear from the perspective of intrusion of the secular state into setting standards for ministry. The secularization of ministry through the importation of secular workplace standards and yardsticks by which to measure performance are a sufficiently grave infringement[88] that a separate cause of action

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[84] *See* Destefano v. Grabrian, 763 P.2d 275, 285 (Colo. 1988) ("To date, no court has acknowledged the existence of . . . a tort" of clergy malpractice); Roppolo v. Moore, 644 So. 2d 206, 208 (La. Ct. App. 1994) ("To date, no court has acknowledged the existence of a separate cause of action for the malpractice of a clergy member while acting within a clerical capacity."); Greene v. Roy, 604 So. 2d 1359, 1362 (La. Ct. App. 1992) ("There are no jurisdictions in the United States that have established a cause of action for clerical malpractice."); *Schieffer*, 508 N.W.2d at 911 ("So far as we have been able to determine, no jurisdiction to date has recognized a claim for clergy malpractice.").

[85] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 546–47 (1993); McDaniel v. Paty, 435 U.S. 618, 626 (1978).

[86] *See* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16–17 (1929).

[87] *See* Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 363 U.S. 190, 191 (1960).

[88] *See Destefano*, 763 P.2d at 290 (Quinn, C.J., concurring) (indicating that subjecting clergy to same standards as marriage counselors or licensed psychologists would endanger that which makes religious, as opposed to secular, counseling desirable).

for "clergy malpractice" is to be resisted.[89] There are, after all, other tort remedies available.

2. Derivative Liabilities

a. *Respondeat Superior*

Jeffrey Scott E. v. Central Baptist Church reflects the overwhelming majority rule that religious organizations are not liable for sexual assaults committed by those who minister for them under the doctrine of respondeat superior.[90] Such actions are not only unforeseeable but they violate the very things held sacred by the church. Arguments that ministers routinely have access to vulnerable persons and minors because they can exploit positions of trust have not persuaded courts to alter this majority rule.[91] In only one jurisdiction have the courts adopted a different view of vicarious liability, holding that juries may assess, as a question of fact, the degree to which the person was acting for his own selfish or criminal motives as opposed to acting for his religious employer.[92]

In these times, it is not likely that a jury, when given such a case, will find that a person acted entirely out of his own selfish designs unless the evidence is overwhelming and clear. This extreme version of vicarious liability must therefore be seen as a rule approaching strict liability, reflecting a policy that the vulnerable deserve an extraordinary protection against the supposedly dangerous people who are al-

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[89] In reaching this conclusion, I put off for another day the discussion of identifying the proper standard-setting defendant and the proper supervising defendant if there is to be a tort of clergy malpractice. For example, would there be a cause of action against the religious body that writes the Book of Discipline or Code of Canon Law for failure to anticipate a departure from ministerial expectations? Such a cause further complicates both the tort and the constitutional pictures.

[90] *See* 243 Cal. Rptr. 128, 130, 131–32 (Ct. App. 1988).

[91] *See* Tichenor v. Roman Catholic Church, 869 F. Supp. 429, 433–34 (E.D. La. 1993), *aff'd*, 32 F.3d 953 (5th Cir. 1994); *see also* Dausch v. Rykse, 52 F.3d 1425, 1429 (7th Cir. 1994) (Coffey, J., concurring); *id.* at 1436 (Ripple, J., concurring).

[92] *See* Fearing v. Bucher, 977 P.2d 1163, 1166–67 (Or. 1999). In *Fearing*, the court noted that sexual assault on a minor is not part of the scope of duty of a cleric. *See id.* at 1166. The court opened the door to pleading a cause of action in respondeat superior, however, when the plaintiff states facts that, if true, show that the perpetrator was acting within the scope of his duty when he committed acts that led to the acts that caused the injury. *See id.* In other words, the court may allow a claim for the deceit of a pastor that allowed him access to a minor if ministry to young adults is part of his official duties. *See id.* at 1166–67. It will be difficult to maintain the line between official acts and the abandonment of those acts. This rule is a departure from the rules previously applied by courts and contrary to other decisions. *See, e.g.*, *Jeffrey Scott E.*, 243 Cal. Rptr. at 130–31.

lowed to minister in religious organizations in the United States today. The better view is that criminal impulsive and abusive behavior, contrary to religious teaching and law, is not even remotely in the service of the religion. Such personal acts bar a cause of action here.

b. *Negligent Hiring and Retention*

Far more likely are claims based around negligent hiring, retention, and supervision. These claims depend for success on the existence of antecedent knowledge in the possession of religious superiors who were in a position to act on the knowledge so as to have prevented the sexual misconduct from occurring. Just stating the question indicates the number of potential difficulties in asserting this kind of liability consistent with the U.S. Constitution.

Some courts reason that the First Amendment "does not grant religious organizations absolute immunity from tort liability,"[93] which is true but not helpful because it fails to address the question of when such organizations are immune from tort liability or whether liability is appropriate under the precise circumstances of the case under review. Other courts employ the familiar *Reynolds v. United States* distinction[94] between belief and acts.[95] This too is unhelpful because it fails to consider the circumstances in which conduct is constitutionally protected and fails to distinguish those circumstances from others. Plainly a constitutional guarantee of free *exercise* of religion must protect at least some conduct against government intrusion. The belief/acts distinction only skirts the problem. Still other courts reason that negligent hiring claims require no inquiry into religious beliefs.[96] If this were true, it would be insufficient to prove justiciability.[97] Otherwise, many employment discrimination claims by ministers could be decided by courts, at least when the defending church *agrees* that it does not discriminate on the basis alleged by the plaintiff or asserts

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[93] Moses v. Diocese of Colo., 863 P.2d 310, 319 (Colo. 1993).

[94] Reynolds v. United States, 98 U.S. 145 (1878).

[95] *Moses*, 863 P.2d at 319.

[96] Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323–24 (Colo. 1996).

[97] Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's claim of autonomy. *See* John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. Rev. 1167, 1177 (2003).

nonreligious grounds for its decision. We know from the consistent case law upholding the ministerial exception that this is not the case.[98]

The recent decisions by the Florida Supreme Court in *Doe v. Evans*[99] and *Malicki v. Doe*[100] illustrate the difficulties in articulating such a cause of action. The Florida Supreme Court, in *Malicki*, stated that:

> (1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.[101]

According to the court, these inquiries do not violate the U.S. Constitution because a religious entity condemns sexual abuse and the autonomy rules are limited to a specific subset of disputes inapplicable to tort cases.[102] These limitations on the court's analysis miss the point: the nature of the dispute is not determinative but, rather, one must focus on how a court is to determine the meaning of key terms in the legal standard—"appropriate investigation," "unsuitability," "particular duty," "employment," "employment in general," etc.—without probing deeply into basic religious questions for a faith community.

The claim that negligent hiring requires no inquiry into religious beliefs or practices seems questionable. Applied to churches, that would seem to call for evidence of what various levels of authority within a church *actually* do when the church selects someone for ministry, and why. The process a church actually undertook with respect to determining fitness for ministry will then be measured by a jury or other fact finder against a secular (i.e., court-imposed) standard. It would seem difficult to complete such an evaluation without in some sense trolling through religious beliefs and practices.

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[98] *See, e.g.*, Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1039 (2003) (discussing the "judicially created 'ministerial exception' from civil rights laws" and citing cases).

[99] 814 So. 2d 370 (Fla. 2002).

[100] 814 So. 2d 347 (Fla. 2002).

[101] *Id.* at 361 (quoting Garcia v. Duffy, 492 So. 2d 435, 440 (Fla. Dist. Ct. App. 1986)) (internal quotations omitted).

[102] *See id.* at 360–62.

For example, negligent hiring means that the person placed in ministry should not have been "hired." The "hiring decision" between a religious body and those who minister for it are often themselves religious acts, ordination or call, conducted according to the precepts of religious law and practice. Moreover, the antecedent knowledge supposedly available to religious leaders to prevent such a "hiring" often would occur during the period of religious formation for ordination or call. In these circumstances, it would be profoundly difficult for a court to be able to separate secular aspects of a so-called hiring decision from religious actions undertaken exclusively under religious law and practice.[103]

Similarly, the question of retaining a person in ministry is often bound up in questions of religious doctrine about reconciliation, restoration, and penance. Whether a minister is defrocked or otherwise removed from the roster of clergy or reduced to the lay state is a question of one's religious status as a "minister." Plainly such a decision can have civil consequences, especially when one reflects on the issue of exploitation. It seems to me, however, that to allow a cause of action for negligent retention, as that term is commonly used by religious organizations, like the cause of action for negligent hiring of ministers, is ultimately a challenge to religious doctrine and practice.[104]

c. *Negligent Supervision*

A different question is presented under negligent supervision. In those cases, the issue is not whether one should have been ordained as a minister or whether the religious body is negligent in failing to defrock a minister, but rather whether religious leaders were in possession of information which, if acted upon, could have prevented the harm upon which the lawsuit is based. The question is complex. To recognize a claim of negligence in supervising a minister, on the one hand, creates a risk of imposing upon the church, and upon the relationship between minister and church—what elsewhere has been called the "lifeblood" of an organized church[105]—a structure that may be inimical to it. One court has observed that imposing secular duties and liabilities with respect to ministerial supervision would "infringe upon [the church's] right to determine the standards governing the

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[103] *See* Isely v. Capuchin Province, 880 F. Supp. 1138, 1150–51 (E.D. Mich. 1995).

[104] *See id.*

[105] McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

relationship between the church, its bishop, and the parish priest."[106] On the other hand, when a minister has seriously harmed others, and the church knows of a continued and substantial risk that he or she will seriously harm others again, there are societal interests in allowing recovery against the church whose failure to mitigate the known risk may have created an opportunity for additional harm.

The Florida Supreme Court in *Malicki*, like other courts, found no barrier to a negligent supervision claim.[107] It found that the subject matter of the "dispute," sexual misconduct, did not create a conflict between religious duties and the civil law.[108] Because both condemn abuse, there is no conflict and no constitutional problem.[109] That simplistic approach does not deal with the issue, which does not concern the dispute, but how the dispute must be resolved. The U.S. Supreme Court has said not just the resolution of the dispute but "the very process of inquiry" can create constitutional problems.[110] So too here, if the plaintiff's claims depend on a court reviewing internal policies and protocols, scrutinizing a religious chain of discipline, and assessing culpability because the religious entity emphasized reconciliation and not punishment, the "very process of inquiry" may lead to an unconstitutional exercise.[111]

Where such antecedent knowledge is both clear and in fact available to religious leaders, and directly relevant to the subject matter of the underlying lawsuit,[112] a claim based on a failure of supervision might constitutionally be stated.

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[106] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 445 (Me. 1997).

[107] *See* 814 So. 2d at 360.

[108] *Id.* at 360–61.

[109] *See id.*

[110] NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979).

[111] *See id.*; *see also* Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999). Perhaps the issue is the way defenses are framed. Most challenges to negligence claims assert a lack of subject matter jurisdiction as opposed to a failure to state a claim. Where the objection goes to the evidence and the proofs, perhaps the latter is technically more correct, unless the complaint is a gross attack on the religious supervision system. *Compare* Kelly v. Marcantonio, 187 F.3d 192, 203 (1st Cir. 1999) (affirming grant of summary judgment for defendants), *with Ayon*, 47 F. Supp. 2d at 1248 (dismissing for failure to state a claim).

[112] If the antecedent knowledge is related to some other form of questionable conduct as opposed to the precise form of misconduct charged in the lawsuit, there would be no basis for a negligent supervision claim. *See* Frith v. Fairview Baptist Church, No. 05-01-01605CV, 2002 WL 1565664, at *3–4 (Tex. App. July 17, 2002) (affirming summary judgment for defendant because, even though church breached duty to conduct background check, doing so would not have made conduct foreseeable). In other words, the claimed basis on which the religious leaders should act in cases of misconduct should be other

In such cases, every possible defendant bearing the label Lutheran or Buddhist is not responsible for the negligent supervision. It may be difficult to identify a "supervisor" in the strict sense. Some churches are hierarchical in structure, others congregational. If there is no mediating authority, is the congregation that calls a minister itself responsible for "supervising" him? If the congregation is unincorporated, do the pockets of each and every member of that congregation become subject to a lawsuit? In a hierarchical church, if responsibility for the placement of a minister rests in the hands of a specific religious superior, does that person then assume a secular duty for the kind of oversight and day-to-day supervision that the law expects of supervisors in a commercial setting? The imposition of such a secular duty carries a risk of subtly altering the church's internal structure. A number of courts have held that allowing such a deep probe into the allocation of power within a church would violate the First Amendment.[113]

Applying the defendant-identifying principles set forth above, one must identify which religious entity within the denominational polity has the juridic authority and power to act in the particular area. In a congregational polity, the defendant might be the local church and its leaders who were given the power and ability to select and supervise a minister. For hierarchical bodies, very often it is a regional religious body that is in the sole position to have acted to prevent the harm. In those polities, neither the local church nor the church-wide bodies have the power and ability to prevent the harm from occurring.[114] Pressing more broadly framed assaults on religious entities

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prior instances of misconduct of the minister—instances made known to religious leaders in a position to act. Absent knowledge, there is no liability. Paul J.H. v. Lum, 736 N.Y.S.2d 561 (App. Div. 2002). Without any knowledge or an opportunity to supervise, there may be no liability. Rivers v. Poisson, 761 A.2d 232, 235–36 (R.I. 2000) (finding no duty to supervise janitor in use of phone when no knowledge that janitor would use phone to harass plaintiff); *cf.* Anonymous v. Dobbs Ferry Union Free Sch. Dist., 736 N.Y.S.2d 117, 118 (App. Div. 2002) (determining no liability in district because abuse occurred on social visit away from school).

[113] *See, e.g.*, Ehrens v. Lutheran Church-Missouri Synod, 269 F. Supp. 2d 328, 332 (S.D.N.Y. 2003); *Swanson*, 692 A.2d at 444 (quoting Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich, 426 U.S. 696, 708–09 (1976)); Gibson v. Brewer, 952 S.W.2d 239, 248 (Mo. 1997); Gray v. Ward, 950 S.W.2d 232, 234 (Mo. 1997); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995).

[114] *See* Dewaard v. United Methodist Church, 793 So. 2d 1038, 1040–41 (Fla. Dist. Ct. App. 2001) (concluding local church was not supervising body over pastor and therefore negligent supervision claim not possible against local church, but only against proper supervising defendant, the regional conference and District Superintendent).

that lack the ecclesial competence to have prevented the claimed harm only invites more bad law and injustice to the common good.

Once the proper defendant is identified, the framing of the supervision claim in the way least likely to engage a court in an unconstitutional oversight of a religious entity is the "intentional failure to supervise" cause recognized in the Missouri courts.[115] The basis on which the religious entity failed to act would have to be clear and direct, not based on supposition or inferred knowledge perhaps not even technically available (such as through sacramental confession). There the standard for inaction is clear, not negligence but a deliberate inaction. And the focus is on some intent to allow a well-known harm to occur.

d. *Breach of Fiduciary Duty*

Fiduciary duty has been radically expanded in this area of the law. Unmooring this cause from its traditional foundation in the law of trusts, courts have entertained such claims with increasing frequency in cases involving ministerial misconduct in the last ten years. These claims present whether the minister, or more accurately those who supervise the minister, have a relationship of trust and confidence with the victim such that the religious entity responsible for the minister must take added care for the wellbeing of the victim. Mere membership in the church body generally is not enough to create a fiduciary relationship between the victim and the church body.[116]

Of those courts that have reached the constitutional issue,[117] many have rejected fiduciary duty claims against churches on constitutional grounds.[118] Courts commonly reason that such a claim would

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[115] *Gibson*, 952 S.W.2d at 248; *Gray*, 950 S.W.2d at 234.

[116] *See* Doe v. Roman Catholic Diocese, No. 05-99-01774-CV, 2001 WL 856963, at *3 (Tex. App. July 31, 2001); Hawkins v. Trinity Baptist Church, 30 S.W.3d 446, 452–53 (Tex. App. 2000). Similarly, even for a religious institution "'absent special relationships or circumstances, a person has no duty to protect another from criminal acts of a third person.'" N.J. v. Greater Emanuel Temple Holiness Church, 611 So. 2d 1036, 1038 (Ala. 1992) (quoting Young v. Huntsville Hosp., 595 So. 2d 1386, 1387 (Ala. 1992)).

[117] Courts frequently reject fiduciary duty claims against churches for nonconstitutional reasons. *See* Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839, 845–47 (Me. 1999) (rejecting claim of fiduciary duty because it was not fact-specific enough and the church had no "generalized fiduciary duty . . . to protect members of its congregation from other members"); *Gray*, 950 S.W.2d at 234 (rejecting claim of fiduciary duty as a recharacterization of other barred claims).

[118] *See Dausch*, 52 F.3d at 1438–39 (Ripple, J., concurring in part and dissenting in part); Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991); Amato v. Greenquist, 679

require them to define, and in turn measure a minister's conduct against, a standard of care applicable to ministers as such.[119] A breach of fiduciary duty can "only be construed as clergy malpractice, since it would clearly require a determination concerning [the minister's] duties as a member of the clergy," thereby requiring the court to "'venture into forbidden ecclesiastical terrain.'"[120] In such cases religion is found to be the foundation for the relationship between the plaintiff and the wrongdoer, not something "'merely incidental.'"[121] The minister-counselee or pastor-parishioner relationship is "inescapably premised upon the cleric's status as an expert in theological and spiritual matters."[122] The fact that the wrongful conduct is not religiously motivated is therefore irrelevant[123] because pastoral and spiritual responsibilities in such a case form the very basis for relief, a fact that renders unconstitutional both the proceedings and the relief sought.

In one case, a child molested by a peer claimed that his minister and church owed the victim a fiduciary duty which the church defendants breached by advising him to forgive and forget, and by referring him for counseling to someone who claimed to be, but was not, a licensed mental health professional.[124] The Utah Supreme Court determined that the fiduciary duty claim was "merely an elliptical way of

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N.E.2d 446, 452–53 (Ill. App. Ct. 1997); Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816, 822–23 (Mich. Ct. App. 1999); *Schieffer*, 508 N.W.2d at 912; Langford v. Roman Catholic Diocese, 705 N.Y.S.2d 661, 662 (App. Div. 2000); Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 208–09 (Utah 2001).

[119] *E.g.*, *Dausch*, 52 F.3d at 1429 (affirming dismissal of breach of fiduciary duty claim); *id.* at 1438 (Ripple, J., concurring in part and dissenting in part) ("If the court were to recognize such a breach of fiduciary duty, it would be required to define a reasonable duty standard and to evaluate [the minister's] conduct against that standard, an inquiry identical to that which Illinois has declined to undertake in the context of a clergy malpractice claim and one that is of doubtful validity under the Free Exercise Clause."); *id.* at 1429 (Coffey, J., concurring) (agreeing with Judge Ripple's analysis of the fiduciary duty claim); *Schieffer*, 508 N.W.2d at 912 ("'[A]nalyzing and defining the scope of a fiduciary duty owed persons by their clergy, the [c]ourt would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence.'") (quoting *Schmidt*, 779 F. Supp. at 326).

[120] *Langford*, 705 N.Y.S.2d at 662; *see Teadt*, 603 N.W.2d at 823.

[121] *Amato*, 679 N.E.2d at 454 (quoting H.R.B. v. J.L.G., 913 S.W.2d 92, 99 (Mo. Ct. App. 1995)).

[122] *Id.*

[123] *See id.* ("[W]e would consider unlikely the Pastor's ability to establish that his behavior in this case was religiously motivated," but the fiduciary duty claim was barred nonetheless.). The case involved a claim that defendant began an affair with counselee's spouse, also a counselee of defendant. *Id.* at 448.

[124] *Franco*, 21 P.3d at 200–01.

alleging clergy malpractice."[125] "[B]ad advice" from a minister is not actionable.[126] The courts could not decide such claims "without first ascertaining whether the [church defendants] performed within the level of expertise expected of a similar professional, i.e., a reasonably prudent bishop, priest, rabbi, minister, or other cleric in this state."[127]

Courts that have *allowed* fiduciary duty claims against ministers and churches usually do so because the wrongful conduct was not part of the defendants' religious beliefs or practices or does not require interpretation of religious doctrine.[128] When fiduciary duty claims arise out of sexual or other misconduct between minister and counselee or parishioner, the conduct complained of is rarely, if ever, religiously motivated. If the absence of grounding in specific religious beliefs or practices were sufficient to permit a claim of fiduciary duty, those claims (and, indeed, many others) would not be barred. Claims for racial discrimination under Title VII or clergy malpractice would be similarly permissible, at least when no defense was predicated on religious belief or church doctrine.[129]

Courts have generally suggested only one other reason for allowing fiduciary duty claims—namely, that the plaintiff *in fact* reposed trust in the minister and church.[130] Is this reason sufficient to permit a fiduciary duty claim and to overcome the constitutional objection? Examination of two cases may help answer the question.

In *Moses v. Diocese of Colorado*, a female counselee had a sexual relationship with her Episcopal minister.[131] The counselee's husband, and later the counselee herself, disclosed the affair to the bishop and sought his intervention.[132] The bishop, who the counselee and her husband thought would resolve the problem, told the woman she should keep the matter in confidence.[133] The woman later sued the

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[125] *See id.* at 205.

[126] *See id.*

[127] *Id.* In addition, claimants cannot sue to enforce religious duties or seek damages for their breach. *See* Roman Catholic Bishop v. Superior Court, 50 Cal. Rptr. 2d 399, 406 (Ct. App. 1996) (denying claim that church has civil duty to enforce celibacy).

[128] *See* Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999); *Moses*, 863 P.2d at 321; *Evans*, 814 So. 2d at 376.

[129] Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's claim of autonomy. Otherwise, claims by ministry personnel would and could be adjudicated. *See supra* notes 97–98 and accompanying text.

[130] *See Martinelli*, 196 F.3d at 430–31; *Moses* 863 P.2d at 322–23.

[131] *Moses*, 863 P.2d at 322–23.

[132] *Id.* at 317–18.

[133] *Id.*

minister and the bishop, the latter for breach of fiduciary duty.[134] Among other things, the jury was instructed, without objection, to consider whether the plaintiff's "repose of trust was justified; whether the Diocese or [the bishop] knew, or should have known, that [plaintiff] was relying on [the] [b]ishop . . . to look out for her interests," and whether the bishop "invited" her trust.[135] The jury returned a judgment in favor of the plaintiff and against the bishop.[136] An appeals court affirmed, holding that the bishop "held a position of authority in the church and had the power to resolve conflicts in the church."[137] The bishop's role in meeting with the plaintiff, the appeals court concluded, was "as a counselor" to her.[138] The plaintiff believed that the bishop "had the power to decide if she would lose her salvation," and therefore felt constrained to follow his advice.[139] There was evidence, the court wrote, that the bishop undertook "to resolve the problems" the plaintiff presented to him.[140] "Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor," the court concluded, "a duty exists to act with the utmost good faith for the benefit of the parishioner."[141] Under the general principles of the law, a direct undertaking by a person with authority to act for the benefit of the other would be enough to sustain a conclusion that there exists a fiduciary duty.[142]

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[134] *See id.* at 314.

[135] *Id.* at 322 n.14.

[136] *Moses*, 863 P.2d at 313–14.

[137] *Id.* at 322.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 322–23.

[141] *Moses*, 863 P.2d at 323.

[142] Mary Moses's claim that the bishop owed her a fiduciary duty seemed to arise wholly from his status as bishop and his representation to her that he would resolve the problem. If episcopal status and representations of this type were sufficient to create a fiduciary duty on the part of a bishop, however, it would seem that any bishop or religious superior would be a fiduciary simply by virtue of pastoral acts directed toward those within his episcopal jurisdiction, a conclusion that cannot be reconciled with the U.S. Constitution because it turns episcopal offices and standards into civil ones, and general policies into specifically enforceable fiduciary duties. *Brown v. Pearson* and other cases reject that point. *See* 483 S.E.2d 477, 484–85 (S.C. Ct. App. 1997). The least constitutionally offensive way to interpret *Moses* consistent with the constitutional principles is to construe the case as turning on the specific undertaking by the bishop made personally to plaintiff. *Ayon v. Gourley* expressly rejects *Moses* on this point. 47 F. Supp. 2d at 1248–49 (referring to the view taken in *Moses* as "extremely expansive"). Finally, allowing a jury the authority to evaluate evidence about the scope of a bishop's duties and render a verdict based on what it thinks a bishop should do is precisely the abuse condemned in *United States v. Ballard*. *See* 322 U.S. 78, 86–88 (1944).

In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, the plaintiff claimed that the diocese owed him a fiduciary duty to investigate reports of sexual abuse of other persons by a priest who had allegedly sexually abused the plaintiff, and also to inform the plaintiff of his possible injuries, the memories of which he was said to have repressed.[143] The evidence that plaintiff presented indicated no special undertaking by the diocese as to him.[144] His experience as a member of the local church, except for the fact that he was abused, was no different than that of his peers: he attended youth activities, camps, field trips, and was confirmed.[145] This was enough, the appeals court concluded, to support the jury's finding of a fiduciary relationship between the plaintiff and diocese.[146] The court rejected the diocese's First Amendment objection because the jury had not been asked to consider the validity of any religious teaching or to enforce church law.[147] The jury had been asked, in the court's view, only to decide whether a relationship of trust and confidence existed between the plaintiff and the diocese.[148]

Ministerial status is generally not a defense against fiduciary duty claims arising from factors separate from one's ecclesiastical or religious duties. The minister who holds himself or herself out as a financial advisor owes the same duty of care with respect to his or her client's investments as any other financial advisor. The minister who practices psychiatry owes his or her patients a fiduciary duty not to engage in sexual relationships with them in the same manner as any other psychiatrist.[149] But the minister who holds himself out as a min-

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[143] 196 F.3d at 415, 426.

[144] *See id.* at 429.

[145] *See id.* at 413–14.

[146] *See id.* at 429–30.

[147] *See id.* at 430–31.

[148] *See Martinelli*, 196 F.3d at 430–31.

[149] Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 441, 443 (Minn. 2002) (distinguishing between the acts of the minister as minister and counselor, and remanding for a determination of the jurisdiction to hear claims against the supervising religious body); *see also* Sanders v. Casa View Baptist Church, 134 F.3d 331, 335–36 (5th Cir. 1998) (allowing jury to determine if marriage counseling was "essentially secular" provided defendant with more than enough constitutional protection). On remand from the Minnesota Supreme Court, the Court of Appeals of Minnesota determined that the religious entity could be held liable in a tort case on a theory of negligent employment (supervision, training and retention) without violating the constitutional rights of the faith community. Odenthal v. Minn. Conference of Seventh-Day Adventists, 657 N.W.2d 569, 575–77 (Minn. Ct. App. 2003). The court's determination in this regard turns on the artificial distinction between the pastor's duties as pastor (and the church's actions towards or concerning him in that regard) and the entity's failure to act on information indicating

ister, the bishop who holds himself out as a bishop, and the rabbi who holds himself out as a rabbi, does not assume civil duties by virtue of having assumed religious ones.[150]

In considering what it determined to be evidence of a fiduciary relationship, the court in *Martinelli* seemed remarkably unperturbed by reliance upon such religious teachings as that which holds a bishop to be a "shepherd" of his flock.[151] The court likened its consideration of such teachings to rules of hearsay, in which a statement is admitted into evidence not for the truth of the assertion, but to prove some other fact.[152] What the analogy overlooks is that when the character of a religious leader's office is admitted into evidence, the applicability of a *secular* standard is made to depend upon an *ecclesial* one. In this case, evidence was admitted on whether the defendant invited, and the plaintiff reposed, trust in the bishop *as shepherd of his flock.*[153] The bishop, after all, had not held himself out as an investment counselor or psychiatrist. He had held himself out as a bishop. Hence the reasonableness of his actions, the scope of his pastoral obligations, the reasonableness of the plaintiff's expectations—all of these were defined by the bishop and plaintiff's shared religion, and, of course, other religions may define these obligations and expectations differently as to their own religious leaders. To hear evidence about the character of a religious office, and then, based on those characteristics, to impose and enforce civil duties upon religious leaders by virtue of their position and role as religious leaders, clearly seems to be an unconstitutional exercise of government power.

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sexual improprieties. In fact there is no way to read the decision except to conclude that the court believes the better policy is to hold the religious body in the case liable and allow the possible unconstitutional evidence or proofs to be excluded at trial. *See id.* at 574, 576; *see also id.* at 577 (allowing a vicarious liability claim to go forward).

[150] In *Evans*, the Florida Supreme Court noted there were two fiduciary duty claims, one against the minister and the other against the church. 814 So. 2d at 374. Remarkably, after reviewing cases about duties of ministers, the court conflated the two and made the church liable as if its acts were the intentional misconduct of the ministers. *See id.* at 375. This is strict liability, not negligence. The better view of the law is that a breach of fiduciary duty must be based on some actual undertaking directed at the plaintiff (not some undifferentiated group) by the religious entity and those authorized to act for it. Doe v. Hartz, 52 F. Supp. 2d 1027, 1062–64 (N.D. Iowa 1999).

[151] *See* 196 F.3d at 431.

[152] *See id.*

[153] *Id.*

Conclusion

This brief Article cannot evaluate all the various claims that could be presented against religious bodies. The task confronting courts is to identify the proper defendant against which constitutionally stated claims could lie. The identification of the defendant is an exercise in reviewing the corporate and ecclesial documents of the religious organization to decide which entity in the polity has the precise authority to act on the complaint underlying the lawsuit. In addition, courts do not limit their inquiries to these documents but may place responsibility on a part of the polity that, notwithstanding its civil or ecclesial authority to act, has insinuated itself into the dispute. Courts looking for a reliable way to apportion responsibility in complex tort cases against religious organizations would avoid unconstitutional action if they more routinely followed these principles.

In addition, application of these principles in particular (and popular) areas of tort law shows how courts should and should not act. In those cases, especially courts looking for ways to punish religious bodies for their failure to prevent abuse by individual ministers, often there is a willingness to lower standards of knowledge and accountability, even importing secular standards. Religious entities are responsible for the mistakes they make, and recovery in tort is one way to assess that responsibility. But wholesale disregard of constitutional principle also sacrifices well-established liability principle for short-term punishment.