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INNOCENTS BEWARE: ON RELIGION CLAUSE JURISPRUDENCE AND THE NEGLIGENT RETENTION OR HIRING OF CLERGY

Mark Strasser*

INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,¹ the U.S. Supreme Court held that the First Amendment includes a ministerial exception precluding the clergy from suing their religious employers for wrongful employment practices.² The Court's rationale for its holding was rather robust in some respects and may have implications for a variety of cases in which religious institutions are defendants. The decision is problematic not because of the Court's express decision to focus narrowly on the issue before it, but because of the Court's mischaracterization of past case law and its offering of so many mixed signals that the treatment of related issues in the lower courts is almost guaranteed to become even more chaotic.

Over the past several decades, state and federal courts have been forced to consider the circumstances, if any, under which a religious organization might be held civilly liable for the tortious conduct of clergy in their employ.³ There is a clear divide separating the courts—some refuse to impose liability on the employers citing First Amendment concerns whereas others see no First Amendment impediment to the imposition of liability on religious institutions as long as the courts are applying secular law and are not delving into religious matters.⁴ Regrettably, *Hosanna-Tabor* does nothing to clarify the law in this area and, instead, will likely lead to even greater confusion in the lower courts.

Part I of this Article discusses *Hosanna-Tabor* and the jurisprudence preceding it, noting how the Court both has mischaracterized the past jurisprudence and has

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¹ 132 S. Ct. 694 (2012).

² *Id.* at 698.

³ See generally Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 *IND. L.J.* 219 (2000).

⁴ Compare, e.g., *Doe v. Evans*, 814 So. 2d 370, 373 (Fla. 2002) (determining that “the First Amendment d[oes] not bar claims for negligent hiring and supervision because the claims constitute[] neutral principles of tort law that did not violate either the Free Exercise Clause or the Establishment Clause” (citing *Malicki v. Doe*, 814 So. 2d 347, 364–65 (Fla. 2002))), with, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (determining that “[i]t would . . . be inappropriate and unconstitutional for this court to determine after the fact that ecclesiastical authorities negligently supervised or retained the defendant”).

planted the seeds for broad immunity for religious institutions. Part II discusses the developing jurisprudence regarding negligent hiring and retention of clergy by religious institutions, discussing both the clear split within the lower courts and how *Hosanna-Tabor* might affect the developing case law. This Article concludes that the Court must both clarify existing law at its earliest opportunity and forestall some of the broad interpretations that would otherwise result from some of the unfortunate language in *Hosanna-Tabor*.

I. *HOSANNA-TABOR*

In *Hosanna-Tabor*, the Court held that the First Amendment protects religious organizations in their choice of leaders.⁵ That conclusion was expected, both because there is long and settled jurisprudence precluding civil courts from deciding religious matters and because of the unanimity among the circuit courts that some kind of ministerial exception exists.⁶ Nonetheless, the decision is controversial in a number of respects, including the Court's analyses of who counts as a minister for purposes of the exception, what sort of immunity is afforded by the exception, and why the exception even exists. While the implications of *Hosanna-Tabor* will not be clear until future opinions are issued on related cases, the decision is likely to lead to increased confusion in the lower courts in the short term and may lay the foundation for over-broad immunity for religious institutions in the long term.

A. *Hosanna-Tabor's Recognition of the Ministerial Exception*

Hosanna-Tabor involved a suit by a former fourth-grade teacher in a church school,⁷ Cheryl Perich, who claimed to have been discriminated against in violation of the Americans with Disabilities Act (ADA).⁸ Perich had received religious training⁹ to become a "called" teacher,¹⁰ which entitled her to certain employment advantages.¹¹

⁵ *Hosanna-Tabor*, 132 S. Ct. at 696.

⁶ *See id.* at 705 ("[T]he Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.").

⁷ *Id.* at 700 ("Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003–2004 school year.").

⁸ *Id.* at 701 ("Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act, 104 Stat. 327, 42 U.S.C. § 12101 *et seq.* (1990).").

⁹ *Id.* at 707 ("Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher.").

¹⁰ *See id.* at 699.

¹¹ *See id.* ("A commissioned minister serves for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation."); *id.* at 699–700 ("At Hosanna-Tabor, [lay teachers] were appointed by the school board,

The duties of a called teacher did not differ from those of a teacher who had not been called.¹²

The *Hosanna-Tabor* Court cited a number of factors when determining that Cheryl Perich was indeed a minister for constitutional purposes: she received religious training to become a commissioned teacher and was afforded a formal title reflecting that training;¹³ she held herself out as a minister, which entitled her to certain tax advantages among other benefits;¹⁴ and she taught religious doctrine.¹⁵ In light of all of these factors, the Court concluded that she was a minister for purposes of the exception, although the Court declined to specify whether any of the enumerated factors was either necessary or sufficient for that determination.¹⁶

Once making clear that Perich was a minister for First Amendment purposes, the Court held that she was barred from bringing an employment discrimination claim against her employer.¹⁷ The Court understood that its holding might have implications for other kinds of suits but saved those issues for another day.¹⁸ Nonetheless, the rationales offered by the Court must be examined if only because they potentially provide the basis for broad immunity for religious institutions.

The *Hosanna-Tabor* Court refused to give credence to the “remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers,”¹⁹ accepting that the Constitution protects the “internal governance of the church.”²⁰ The Court noted that “[r]equiring a church to accept or retain

without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.”).

¹² *See id.* at 700 (“[T]eachers at the school generally performed the same duties regardless of whether they were lay or called . . .”).

¹³ *Id.* at 707 (“Perich’s title as a minister reflected a significant degree of religious training followed by a formal process of commissioning.”).

¹⁴ *Id.* at 707–08 (“Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning their compensation ‘in the exercise of the ministry.’”).

¹⁵ *Id.* at 708 (“Perich’s job duties reflected a role in conveying the Church’s message and carrying out its mission.”).

¹⁶ *Id.* (“In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”).

¹⁷ *Id.* at 709 (“Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.”).

¹⁸ *Id.* at 710 (“We express no view on whether the exception bars other types of suits, including . . . tortious conduct by their religious employers.”).

¹⁹ *Id.* at 706.

²⁰ *Id.*

an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.”²¹ In addition, imposing sanctions on a church for its termination of a minister’s employment “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”²² Such a result must be avoided as a constitutional matter. “By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”²³ Not only are free exercise guarantees thereby abridged, but the Establishment Clause is implicated as well. “According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”²⁴ Both of the Religion Clauses preclude the State from forcing a church to hire or retain an individual to impart religious doctrine when doing so would result in the dissemination of a message of which the church disapproves.²⁵

B. The Case Law on the Freedom of the Church to Choose Its Own Leaders

When discussing the protections afforded to religious institutions, the *Hosanna-Tabor* Court pointed to several cases discussing the conditions under which civil courts could address legal issues involving religious institutions.²⁶ The Court has long held that civil courts cannot be the final arbiters of church doctrine or practice, and the *Hosanna-Tabor* Court was not breaking new ground when suggesting that civil courts cannot second-guess religious authorities with respect to what the religion requires, permits, or prohibits.²⁷

Consider the Court’s discussion of *Watson v. Jones*,²⁸ which involved a dispute between proslavery and antislavery factions in a Louisville church.²⁹ The General Assembly of the Presbyterian Church had recognized the antislavery faction,³⁰ and the *Watson* Court held that the civil court must defer to the Assembly’s determination:

[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 697.

²⁶ *See id.* at 704–05.

²⁷ *See id.*

²⁸ 80 U.S. (13 Wall.) 679 (1872).

²⁹ *Id.* at 691–92; *see also Hosanna-Tabor*, 132 S. Ct. at 704 (“[T]he Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville, Kentucky.”).

³⁰ *Watson*, 80 U.S. (13 Wall.) at 692.

tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.³¹

Basically, the *Watson* Court suggests that it is beyond the ken of civil courts to decide church doctrine.

Just as the civil courts do not have the expertise to make authoritative determinations regarding religious doctrine, they also do not have the expertise to decide who is best qualified to be the spiritual leader of a church. In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*,³² the Court described *Watson* as radiating “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”³³ The *Kedroff* Court explained that the “[f]reedom to select the clergy, where no improper methods of choice are proven, . . . [has] federal constitutional protection as a part of the free exercise of religion against state interference.”³⁴ Thus, *Kedroff* explained, courts are not only precluded from construing doctrine, but they are also precluded from deciding who is best qualified to lead a church.

One additional case was cited by the *Hosanna-Tabor* Court to establish the degree to which the civil courts must refrain from deciding church matters. In *Serbian Eastern Orthodox Diocese for United States of America and Canada v. Milivojevic*,³⁵ the Court reversed the Illinois Supreme Court’s determination that a particular religious organization had violated its own procedures and constitutional guarantees.³⁶ While the then-existing case law had left an opening for civil courts to decide religious matters in cases “challenging decisions of ecclesiastical tribunals as products of ‘fraud, collusion, or arbitrariness,’”³⁷ the *Milivojevic* Court clarified that there is “no ‘arbitrariness’ exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations.”³⁸ Instead, “civil courts are bound to accept the decisions of the highest judicatories of a religious

³¹ *Id.* at 727.

³² 344 U.S. 94 (1952).

³³ *Id.* at 116; *see also Hosanna-Tabor*, 132 S. Ct. at 704 (citing this *Kedroff* interpretation of *Watson*).

³⁴ *Kedroff*, 344 U.S. at 116 (footnote omitted).

³⁵ 426 U.S. 696 (1976); *see Hosanna-Tabor*, 132 S. Ct. at 705 (discussing *Milivojevic*).

³⁶ *Milivojevic*, 426 U.S. at 708 (“The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.”).

³⁷ *See id.* at 712; *see also Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (“In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”).

³⁸ *Milivojevic*, 426 U.S. at 713.

organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”³⁹ Thus, the *Milivojevich* Court rejected that a civil court could in effect reverse or overrule an “arbitrary” decision of a religious tribunal, which is what the Illinois Supreme Court had done.⁴⁰ However, the *Milivojevich* Court left open “whether or not there is room for ‘marginal civil court review’ under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes.”⁴¹

Watson, Kedroff, and *Milivojevich* all limited the power of civil courts to second-guess the determinations of religious authorities on religious matters, although leaving open whether there might be some circumstances where “marginal civil court review”⁴² might still be warranted. Up until *Hosanna-Tabor*, the Court had tried to offer a nuanced approach, precluding courts from deciding almost all religious matters but leaving open the role of courts in secular matters involving a clergy person.⁴³ The *Hosanna-Tabor* Court eschewed the approach suggesting that religious courts should decide religious matters and civil courts should decide civil matters, writing:

The purpose of the [ministerial] exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter “strictly ecclesiastical,”—is the church’s alone.⁴⁴

But neither the exception nor its purpose had ever before been so described by the Court,⁴⁵ so the Court’s announcing of a possibly robust immunity from secular law in this area was at least surprising. While it is correct to point out that the *Hosanna-Tabor* decision was limited in that it only dealt with employment matters involving ministers,⁴⁶ it has implications that are potentially much broader.

³⁹ *Id.*

⁴⁰ *See id.* at 712 (discussing “[t]he conclusion of the Illinois Supreme Court that the decisions of the Mother Church were ‘arbitrary’”).

⁴¹ *Id.* at 713; *see also* Lisa J. Kelty, Note, *Malicki v. Doe: The Constitutionality of Negligent Hiring and Supervision Claims*, 69 BROOK. L. REV. 1121, 1136 (2004) (discussing “the fraud/collusion exception to the normal rule that neither secular courts nor states should become involved in the clergy selection process of religious groups”).

⁴² *Milivojevich*, 426 U.S. at 713.

⁴³ *See generally* Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431 (2011) (discussing that before *Hosanna-Tabor*, the question about church autonomy was not fully closed).

⁴⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012) (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)).

⁴⁵ *See* Schwartz & Appel, *supra* note 43, at 451–53.

⁴⁶ *Hosanna-Tabor*, 132 S. Ct. at 710 (“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit.”).

The *Hosanna-Tabor* Court discussed the constitutional harms that might occur were a church forced to employ a minister whom that church did not wish to employ. Those harms were not limited to those that might arise from the wrong person preaching from the pulpit, e.g., an incorrect representation of church doctrine, but included other harms as well that could not simply be avoided by refusing to afford the individual pulpit access.⁴⁷

The Court noted that Perich no longer sought to return to her former position.⁴⁸ However, she did seek “frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney’s fees,”⁴⁹ i.e., compensation for the discriminatory treatment that she claimed to have suffered. But an “award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.”⁵⁰ The Court explained that such “relief would depend on a determination that *Hosanna-Tabor* was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.”⁵¹ According to the *Hosanna-Tabor* Court, the ministerial exception when successfully invoked precludes a civil court from making a determination that a religious institution violated civil law with respect to a minister working there, at least insofar as the person’s conditions of employment were concerned.⁵²

Here, the Court was expanding the limitations previously recognized. While the existing jurisprudence had established that civil courts could not make a determination that a church had chosen the wrong leader,⁵³ e.g., because that leader allegedly had a mistaken doctrinal view or because the church had not followed its own bylaws or traditions in the selection, the Court had never suggested that a civil court would be precluded from finding that a church had not acted in accord with civil laws when hiring or firing someone. Indeed, the *Kedroff* Court had qualified the freedom of the church to choose clergy by saying that the civil courts could not disturb such choices “where no improper methods of choice are proven,”⁵⁴ and the *Milivojevich* Court had left open whether a civil court could find that religious authorities had committed fraud or had improperly colluded to deny someone her rights.⁵⁵ But these qualifications suggest that

⁴⁷ See *id.* at 706.

⁴⁸ *Id.* at 709 (“Perich no longer seeks reinstatement, having abandoned that relief before this Court.”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 698.

⁵² Because the ministerial exception is an affirmative defense, the religious institution that fails to invoke it may lose its protections. See *id.* at 709 n.4 (“[T]he exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”).

⁵³ See *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16–17 (1929).

⁵⁴ *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

⁵⁵ See *supra* note 41 and accompanying text.

civil courts might have some role to play in certain kinds of cases involving church leadership disputes. Admittedly, neither the *Kedroff* Court nor the *Hosanna-Tabor* Court⁵⁶ provided much help with respect to how such improper methods might be proven or what the civil court would be permitted to do if the necessary predicate were established. Further, the *Milivojevich* Court did not discuss the conditions under which a civil court would be permitted to explore whether a fraud had been committed.⁵⁷ Nonetheless, the previous decisions left open whether civil courts might have some role to play in leadership disputes, whereas the *Hosanna-Tabor* Court was implying that civil courts are precluded from deciding purely secular matters in light of secular laws.

The *Hosanna-Tabor* Court understood that *Employment Division v. Smith*⁵⁸ might seem to militate against the recognition of a ministerial exception, because the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”⁵⁹ Further, the Court acknowledged that the Americans with Disabilities Act (ADA)⁶⁰ “is a valid and neutral law of general applicability.”⁶¹ However, the Court reasoned, the religious use of peyote at issue in *Smith* was distinguishable from the alleged retaliatory treatment at issue in *Hosanna-Tabor*.⁶² The former merely “involved government regulation of only outward physical acts.”⁶³ In contrast, the latter “concerns government interference with an internal church decision that affects the faith and mission of the church itself.”⁶⁴

There was some irony in the Court’s distinguishing between the two cases in this way. In *Smith*, Oregon was criminalizing what everyone agreed was a sincere religious practice,⁶⁵ whereas *Hosanna-Tabor* allegedly involved an employment termination for non-religious reasons.⁶⁶ It is at the very least surprising that the Free Exercise Clause would protect the allegedly non-religious action over the clearly religious one, especially when there was no evidence that the latter had caused any harm.⁶⁷ Further,

⁵⁶ The *Hosanna-Tabor* Court cited the *Kedroff* improper methods passage with approval. *Hosanna-Tabor*, 132 S. Ct. at 704 (citing *Kedroff*, 344 U.S. at 116).

⁵⁷ *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1976).

⁵⁸ 494 U.S. 872 (1990).

⁵⁹ *Hosanna-Tabor*, 132 S. Ct. at 706 (quoting *Smith*, 494 U.S. at 879) (internal quotation marks omitted); see also Schwartz & Appel, *supra* note 43, at 445 (“*Smith* decided that the Free Exercise Clause did not require a state to excuse religious believers from a religiously neutral law of general applicability, specifically a criminal prohibition on the use of controlled substances.”).

⁶⁰ Americans with Disabilities Act, 42 U.S.C. § 12101 (2006).

⁶¹ *Hosanna-Tabor*, 132 S. Ct. at 707.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (citing *Smith*, 494 U.S. at 877).

⁶⁵ See *id.* at 706 (noting that “the peyote had been ingested for sacramental purposes”).

⁶⁶ See *id.* at 700–01 (describing the circumstances of Perich’s termination).

⁶⁷ See *Smith*, 494 U.S. at 911–12 (Blackmun, J., dissenting) (“The State proclaims an

suppose that the government were to criminalize the “sacramental use of bread and wine.”⁶⁸ Presumably, many would object to a characterization of such a government action as merely involving “government regulation of only outward physical acts.”⁶⁹ They would instead suggest that the State was regulating something of great religious importance.⁷⁰ By the same token, the sacramental use of peyote also should not have been characterized as merely as an outward physical act.

An additional difficulty posed by *Hosanna-Tabor* is the Court’s suggestion that a damage award to Perich was precluded because such an award would mean that the Church had made a mistake.⁷¹ That same rationale might be employed to preclude an award against a church that had refused to fire a minister who was known to harm innocent individuals,⁷² because such an award would also be predicated on a determination that a church had made a mistake with respect to its decision to retain a particular minister. The issue of whether churches can be held liable for their reckless or negligent supervision or retention of clergy has arisen in several jurisdictions and the courts have been unable to reach a consensus about how such cases should be handled.

II. CHURCH AUTONOMY AND THE FIRST AMENDMENT

The ministerial exception bars an individual classified as a minister for First Amendment purposes from suing her religious employer for employment discrimination.⁷³ As *Hosanna-Tabor* illustrates, that exception is triggered when an individual meets general conditions.⁷⁴ However, a separate issue involves the conditions, if any,

interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.”).

⁶⁸ *Id.* at 877.

⁶⁹ *Hosanna-Tabor*, 132 S. Ct. at 707.

⁷⁰ *Cf.* *People v. Woody*, 394 P.2d 813, 817 (Cal. 1964) (“Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament.”).

⁷¹ *See Hosanna-Tabor*, 132 S. Ct. at 709 (“An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.”).

⁷² *See Schwartz & Appel*, *supra* note 43, at 452 (noting that the *Hosanna-Tabor* “decision rested on broad principles of church autonomy over internal religious affairs—principles that the Court said arise from both the Establishment and Free Exercise Clauses”); *see also id.* at 471 (suggesting that the reasons that negligent retention suits are permitted involves a “lack of understanding about the church autonomy doctrine and its effects on the correct application of common law tort doctrines”).

⁷³ 45C AM. JUR. 2D *Job Discrimination* § 2153 (2013) (“[A] ‘ministerial exception’ applies to job discrimination claims on the ground that a church must possess the freedom to select those who will carry out its mission.”).

⁷⁴ The Court has noted that “the ministerial exception is not limited to the head of a religious congregation,” but has declined “to adopt a rigid formula for deciding when an employee qualifies as a minister.” *Hosanna-Tabor*, 132 S. Ct. at 707.

under which a religious institution can be sued for tortious harms caused by one of its employees, and courts have split as to whether the First Amendment precludes suits against religious institutions for the tortious conduct of their ministers.

A. The Church Autonomy Doctrine

The Court has long recognized that churches have autonomy to make certain decisions. *Watson*, *Kedroff*, and *Milivojevich* all speak to respects in which civil courts are simply not competent to decide doctrinal matters.⁷⁵ For example, it should neither be alarming nor even surprising that civil courts should refrain from entering into disputes about the authoritative construction of religious texts.⁷⁶ As *Milivojevich* illustrates, even attempts by civil courts to offer authoritative interpretations of religious procedural guarantees is inappropriate—while judges are, of course, trained to read texts, they may nonetheless lack the requisite understanding and appreciation of church precedent and may not be able to judge which conflicting testimony should be given more weight.⁷⁷

Merely because courts cannot offer authoritative judgments about church doctrine or procedure does not mean that church practices are immune from civil review. Indeed, religious practices are sometimes criminalized. For example, the *Smith* Court upheld the criminal prosecution of the sacramental use of peyote.⁷⁸ Further, the Court upheld the criminal prosecution of polygamy in *Reynolds v. United States*,⁷⁹ a case still cited with approval.⁸⁰

The Court has been willing to enter the fray even when criminal laws are not at issue. In *Bouldin v. Alexander*,⁸¹ the Court held that one faction of a church had improperly removed a competing (majority) faction from membership.⁸² In a few different cases involving challenges to ownership of church property, the Court used “neutral principles of law” to resolve the dispute.⁸³

⁷⁵ See *supra* Part I.B.

⁷⁶ See *Moses v. Diocese of Colo.*, 863 P.2d 310, 320 (Colo. 1993) (“[C]ourts must not become embroiled in disputes involving a religious organization if the court would be required to interpret or weigh church doctrine.”).

⁷⁷ Cf. *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 718 (1996) (criticizing a civil court for having “evaluated conflicting testimony concerning internal church procedures and [having] rejected the interpretations of relevant procedural provisions by the Mother Church’s highest tribunals”).

⁷⁸ See *Emp’t Div. v. Smith*, 494 U.S. 872, 880 (1990) (“Because respondents’ ingestion of peyote was prohibited under Oregon law . . . Oregon may, consistent with Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.”).

⁷⁹ 98 U.S. 145 (1878).

⁸⁰ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

⁸¹ 82 U.S. 131 (1872).

⁸² See *id.* at 140 (“An expulsion of the majority by a minority is a void act.”).

⁸³ See *Jones v. Wolf*, 443 U.S. 595, 604 (1979) (“[A] State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.”); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370

Writing as a Circuit Justice, then-Justice Rehnquist offered his understanding of the limitations on the civil courts when deciding disputes involving religious parties. He noted that there “are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes,”⁸⁴ but rejected that “those constraints similarly apply outside the context of such intraorganization disputes.”⁸⁵ Basically, civil courts must shy away from deciding doctrinal matters because of “a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.”⁸⁶ However, “[s]uch considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.”⁸⁷ Thus, while courts must not decide doctrine, they are not precluded from applying secular law to resolve disagreements that cannot be characterized as intrachurch disputes.

B. Suing the Clergy and Religious Institutions

For decades, both state and federal courts have debated the conditions under which neutral principles of law should govern when a religious institution is a defendant. The focus here will involve two different kinds of scenarios in which a plaintiff might sue a church for negligent hiring, supervision, or retention. One kind of case involves a suit where an employed minister allegedly had sexual relations with an adult plaintiff, whereas the other kind of case involves an employed minister who allegedly had sexual relations with a child.

1. Cases Involving Alleged Victimization of Adults

Over thirty years ago, the Colorado Supreme Court in *Destefano v. Grabrian*⁸⁸ was asked to decide whether a priest was immune from suit for allegedly having engaged in sexual relations with a woman receiving marriage counseling from him.⁸⁹

(1970) (Brennan, J., concurring) (“[N]eutral principles of law, developed for use in all property disputes, provide another means for resolving litigation over religious property.” (citation omitted)); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”).

⁸⁴ *Gen. Council on Fin. & Admin. of United Methodist Church v. Superior Court*, 439 U.S. 1355, 1372 (1978) (Rehnquist, J.) (citing *Serbian E. Orthodox Diocese of the U.S. & Can. v. Milivojevic*, 426 U.S. 696, 709 (1996)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1373 (citing *Milivojevic*, 426 U.S. at 709–10).

⁸⁷ *Id.* at 1369.

⁸⁸ 763 P.2d 275 (Colo. 1988).

⁸⁹ *Id.* at 283 (“The threshold issue that we must first resolve is whether a member of the clergy, who holds himself out as being trained and capable of conducting marital counseling,

The court held that a fiduciary relationship had been established between the priest and the counselee⁹⁰ and that the counselor had a duty to refrain from engaging in conduct that might harm his client's marriage.⁹¹ The court refused to recognize a separate action for "clergy malpractice," at least in part, because the recognition of such a tort "raises serious first amendment issues."⁹²

A separate question was whether the Diocese could also be liable for the counselor's tortious behavior.⁹³ The *Destefano* court rejected the counselee's claim for vicarious liability, because a priest's engaging in "sexual intercourse with a parishioner . . . is not part of the priest's duties nor customary within the business of the church."⁹⁴ Indeed, a "priest's violation of his vow of celibacy is contrary to the instructions and doctrines of the Catholic church."⁹⁵ However, the court suggested that the Diocese might "be directly liable for negligently supervising [the counselor]"⁹⁶ if the necessary predicate could be established and the employer knew or should have known that the counselor would likely cause harm.⁹⁷

is immune from any liability for harm caused by his counseling by virtue of the first amendment [sic].").

⁹⁰ *Id.* at 284 ("We have no difficulty in finding that Grabrian, as a marriage counselor to Robert and Edna, owed a fiduciary duty to Edna.").

⁹¹ *Id.* ("As a fiduciary, he was obligated not to engage in conduct which might harm the Destefanos' relationship. If the allegations are true, it is clear to us that Grabrian breached his duty and obligation when he had sexual intercourse with Edna."); *see also Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir. 1998) ("The First Amendment difficulties posed by a claim for clergy malpractice are not, however, present in this case because the duties underlying the plaintiffs' claims for malpractice by a marriage counselor and breach of fiduciary duties are not derived from religious doctrine. That is, because the jury found that Baucum held himself out as possessing the education and experience of a professional marriage counselor, his counseling activities with the plaintiffs were judged, not by a standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances."); *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 441 (Minn. 2002) ("[A]pplying neutral statutory principles that do not require any reference to or assessment of a religious component, the court could conclude that Rideout was acting as an unlicensed mental health practitioner, and the court or jury can determine whether he violated the standards of conduct set forth in section 148B.68.").

⁹² *Destefano*, 763 P.2d at 285; *see also Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661, 663 (N.Y. App. Div. 2000) (Miller, J., concurring in part and dissenting in part) ("[A]ny attempt to define the duty of care owed by a member of the clergy to a parishioner fosters 'excessive entanglement with religion.'").

⁹³ *See Destefano*, 763 P.2d at 278 (including, as part of Plaintiff's complaint, the allegation that the Diocese was liable as a matter of respondeat superior).

⁹⁴ *Id.* at 287.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 289; *see also Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993) ("Civil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are

That same year, the Ohio Supreme Court was confronted with somewhat similar facts in *Strock v. Pressnell*.⁹⁸ Richard Strock and his wife were experiencing marital problems and consulted their minister, James Pressnell.⁹⁹ The court began its analysis by explaining that “the First Amendment has not been construed to create blanket tort immunity for religious institutions or their clergy.”¹⁰⁰ The court rejected that “the sexual activities in which Pressnell is alleged to have participated are protected by the Free Exercise Clause”¹⁰¹ and described “the alleged conduct—[as] nonreligious in motivation”¹⁰² and as “a bizarre deviation from normal spiritual counseling practices of ministers in the Lutheran Church.”¹⁰³ Nonetheless, the court rejected a claim for clergy malpractice¹⁰⁴ as well as an intentional infliction of emotional distress claim, because permitting that cause of action under these circumstances would have allowed an end-run around the State’s having abolished the torts of alienation of affections¹⁰⁵ and criminal conversation.¹⁰⁶ By the same token, because the husband was suing the minister,¹⁰⁷ the court refused to entertain a breach of fiduciary duty claim, reasoning that permitting such a claim would also involve an end-run around the abolition of the

supported by competent evidence in the record.”) (citing *Destefano*, 763 P.2d at 284); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927, 932 (N.Y. Sup. Ct. 1992) (“If, however, plaintiffs are successful in establishing that, with knowledge that the priest was likely to commit sexual abuse on youths with whom he was put in contact, his employers placed or continued him in a setting in which such abuse occurred, the fact that the placement occurred in the course of internal administration of the religious units does not preclude holding the institutions accountable to the victim of their neglect in administration.”); *Erickson v. Christenson*, 781 P.2d 383, 387 (Or. Ct. App. 1989) (explaining that the plaintiff’s “allegations, if proven, that Luther Memorial employed and directed Christenson to counsel parishioners, failed to investigate claims of his sexual misconduct, failed to remove him or to warn parishioners of his misuse of his position and failed to supervise him adequately following his nervous breakdown or to direct him to seek expert advice to deal with his abusive behavior would make it reasonable for the jury to infer that it created the risk of harm to plaintiff”).

⁹⁸ 527 N.E.2d 1235 (Ohio 1988).

⁹⁹ *See id.* at 1236.

¹⁰⁰ *Id.* at 1237.

¹⁰¹ *Id.* at 1238.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1239 (“[C]lergy malpractice is not a tort theory that is viable under the facts before us.”).

¹⁰⁵ *See* BLACK’S LAW DICTIONARY 85 (9th ed. 2009) (“Alienation of affections. A tort claim for willful or malicious interference with a marriage by third party, without justification of excuse.”).

¹⁰⁶ *See Strock*, 527 N.E.2d at 1243 (“[W]e hold that the torts of alienation of affections and criminal conversation, which were abolished by R.C. 2305.29, are not revived by the recognition of the independent tort of intentional infliction of emotional distress.”); *see also* BLACK’S LAW DICTIONARY 430 (9th ed. 2009) (“Criminal conversation. A tort action for adultery brought by a husband against a third party who engaged in sexual intercourse with his wife.”).

¹⁰⁷ *Strock*, 527 N.E.2d at 1236 (“Appellant, who was subsequently divorced from his wife, filed a lawsuit against both Pressnell and the church.”).

heart balm causes of action.¹⁰⁸ Because the court rejected all claims against Pressnell, it also rejected that a cause of action could be maintained for negligent training or supervision.¹⁰⁹

While the *Strock* court dismissed the negligent supervision and retention claims against the Church in this particular case, the court was not thereby erecting a bar to the successful prosecution of such a cause of action in a case with different facts. Indeed, in a later case, the Ohio Supreme Court explained that “if a church hires an individual despite knowledge of prior improper behavior in his former church-related employment, the church may be liable in tort for negligent hiring.”¹¹⁰ However, Ohio has taken an unusual step in negligent hiring cases involving churches, requiring “greater specificity in pleading . . . due to the myriad First Amendment problems which accompany such a claim.”¹¹¹ Thus, in Ohio, “in order to survive a motion to dismiss, a plaintiff bringing a negligent hiring claim must allege some fact indicating that the religious institution knew or should have known of the employee’s criminal or tortious propensities.”¹¹²

Courts have taken a variety of approaches to negligent hiring and retention suits brought against churches. For example, some courts have held that the First Amendment bars a negligent hiring claim,¹¹³ but does not bar a negligent supervision or retention claim.¹¹⁴

¹⁰⁸ See *id.* at 1241, 1243 (“For the same reasons that intentional infliction of emotional distress was not a viable action in the case at bar, an action for breach of a fiduciary duty is equally unwarranted.”).

¹⁰⁹ *Id.* at 1244 (“[A]n underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer. Because no action can be maintained against Pressnell in the instant case, it is obvious that any imputed actions against the church are also untenable.”).

¹¹⁰ *Byrd v. Faber*, 565 N.E.2d 584, 586 (Ohio 1991) (citing *Bender v. First Church of the Nazarene*, 1989 WL 104765); see also *Matthews v. Wittenberg Coll.*, 178 N.E.2d 526, 526–27 (Ohio Ct. App. 1960).

¹¹¹ *Byrd*, 565 N.E.2d at 589–90.

¹¹² *Id.* at 590; see also Christopher L. Barbaruolo, Note, *Malicki v. Doe: Defining a Split of Authority Based on the State Tort Claims of Negligent Hiring and Supervision of Roman Catholic Clergy and the First Amendment Conflict*, 32 HOFSTRA L. REV. 423, 457 (2003) (suggesting that the Ohio heightened pleading requirement is a good compromise).

¹¹³ See *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150–51 (E.D. Mich. 1995) (“[A]ny inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion. Therefore, Plaintiff’s claims of negligence predicated upon a ‘negligent hiring’ theory will be dismissed.”).

¹¹⁴ *Id.* at 1151 (“[T]he Court believes that, unlike in the case of hiring decisions, matters pertaining to the supervision of Fathers Buser and Leifeld can be decided without determining questions of church law and policies. Therefore, the Court finds that no First Amendment issues are implicated which would mandate dismissal of the negligent supervision claims.”).

Consider *Vione v. Tewell*,¹¹⁵ which involved a minister who had an affair with a woman receiving marriage counseling from him. The court first examined whether the minister was liable, noting that the minister's "undertaking to act as marriage counselor made him a fiduciary."¹¹⁶ The minister was "in a position of trust, in which he had a duty to act honestly and advise plaintiff in furtherance of plaintiff's interest in preserving his marriage, which was the object of the relationship."¹¹⁷ Because of the fiduciary nature of the relationship, this case was distinguishable from one "where a minister engaged in a consensual sexual relationship while acting as a spiritual adviser."¹¹⁸ By making such a distinction, the court was limiting potential suits to those individuals with whom the minister had a "special" relationship and not merely a minister-congregant relationship.¹¹⁹

A separate issue was whether the Church might be liable for negligent retention or supervision. The court reasoned that a "claim for negligent supervision or retention arises when an employer places an employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising or retaining the employee."¹²⁰ Here, the court was not suggesting that the employer would be strictly liable for the harm caused by the employee. In addition, "[a]n essential element of these causes of action [is] that the employer knew or should have known of the employee's propensity for the conduct that caused the injury."¹²¹ In this case, it was at least alleged that "the Church defendants knew, or should have known, of Tewell's propensity to engage in harmful conduct, but decided to look the other way."¹²² Thus, because of the special relationship

¹¹⁵ 820 N.Y.S.2d 682 (N.Y. Sup. Ct. 2006).

¹¹⁶ *Id.* at 686.

¹¹⁷ *Id.*; see also Schwartz & Appel, *supra* note 43, at 466 (noting that "if a cleric holds himself or herself out as qualified to give professional secular counseling, courts have found that a fiduciary duty is owed when providing purely secular services").

¹¹⁸ *Vione*, 820 N.Y.S.2d at 686.

¹¹⁹ Cf. *Anderson v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 2007 WL 161035, at *23 (Tenn. Ct. App. 2007) ("[T]he clergy-parishioner relationship alone is not sufficient to establish a fiduciary duty There must exist 'something more,' e.g., an additional or special relationship, usually that arising from formal counseling." (citing *Ahern v. Kappalumakkel*, 903 A.2d 266, 198-99, 270-71 (Conn. Ct. App. 2006))).

¹²⁰ *Vione*, 820 N.Y.S.2d at 687 (citing *Sheila C. v. Povich*, 781 N.Y.S.2d 342, 350 (N.Y. App. Div. 2004)).

¹²¹ *Id.* (citing *Povich*, 781 N.Y.S.2d at 350).

¹²² *Id.*; see also *Doe v. Liberatore*, 478 F. Supp. 2d 742, 760 (M.D. Pa. 2007) ("When viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in supervising and retaining Liberatore."); *Schovanec v. Archdiocese of Okla. City*, 188 P.3d 158, 173 (Okla. 2008) ("The Archdiocese's argument that Father Imming's alleged sexual abuse was not foreseeable from the conduct that the Archdiocese had notice of presents an issue that is dependent upon the inference made by the trier of fact concerning what a reasonably prudent person would do in the circumstance of the defendant We accordingly reverse

between the employee and the victim and because the Church was (allegedly) on notice that harm would befall the victim, the Church might be held liable for not having done more to prevent the harm.

In *Pritzlaff v. Archdiocese of Milwaukee*,¹²³ the Wisconsin Supreme Court considered whether the Archdiocese was potentially liable for a priest's having forced himself upon the plaintiff twenty-seven years before she brought her suit.¹²⁴ The court found her suit time-barred,¹²⁵ but nonetheless decided to address the negligent hiring and retention claim.¹²⁶ The court explained that the "the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices."¹²⁷

While the *Pritzlaff* court is correct that civil courts are unable to offer authoritative interpretations of church canons, policies, and practices, the court was incorrect insofar as it was implying that the civil courts would have to offer an interpretation of doctrine when assessing whether the Church had been negligent. The Catholic Church is of course permitted to ordain the individual in light of its own criteria. Liability only arises if (1) what was alleged was accurate and the church knew or should have known that the priest would, for example, likely subject teenage girls to nonconsensual sexual relations,¹²⁸ and (2) the church did too little to protect the young women who were members of the Church.¹²⁹ An Indiana appellate court explained in a case of alleged child molestation¹³⁰ that "review only requires the court to determine if the Church Defendants knew of Henson's inappropriate conduct, yet failed to protect third parties from him."¹³¹ In such an inquiry, the "court is simply applying secular standards to secular conduct which is permissible under First Amendment standards."¹³²

the trial court's summary judgment on Schovanec's claim of negligent supervision and retention . . .").

¹²³ 533 N.W.2d 780 (Wis. 1995).

¹²⁴ *See id.* at 782 (discussing "Ms. Pritzlaff's allegation concerning Fr. Donovan despite the passage of twenty-seven years since the end of the alleged relationship").

¹²⁵ *See id.* at 789 ("[W]e conclude that Ms. Pritzlaff's claim is time barred . . .").

¹²⁶ *Id.* ("We conclude that even if Ms. Pritzlaff's claim were not time barred, it would still fail to state a claim against the Archdiocese upon which relief could be granted.").

¹²⁷ *Id.* at 790.

¹²⁸ *See id.* at 783.

¹²⁹ *Id.*

¹³⁰ *See Konkle v. Henson*, 672 N.E.2d 450, 452–53 (Ind. App. 1996) ("Katherine A. Konkle . . . had been sexually molested by Floyd Henson, a minister of her church, since she was seven years old.").

¹³¹ *Id.* at 456.

¹³² *Id.*; *see also* *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1326–27 (Colo. 1996) ("Wolfe never presented the jury with a religious basis for his use of massage techniques with counselees but rather explained his use of massage in terms of secular rationale . . . [T]he jury never had to consider whether Wolfe's beliefs concerning the efficacy of touching were grounded in his religious principles."); *McKelvey v. Pierce*, 800 A.2d 840, 851 (N.J. 2002)

If courts are not precluded from applying secular standards to secular conduct even when a religious institution is the defendant, then the religious institution's decision-making about who to hire or retain will likely be affected. For this reason, the Maine Supreme Court rejected in *Swanson v. Roman Catholic Bishop of Portland*¹³³ that liability could be imposed against a church for negligent supervision of a priest who had a sexual relationship with a woman whom he was providing marital counseling.¹³⁴ The court reasoned that "the imposition of secular duties and liability on the church as a 'principal' will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest."¹³⁵ The *Swanson* court concluded that:

[O]n the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited.¹³⁶

Regrettably, the Maine Supreme Court did not specify which facts of the case militated in favor of its holding. Courts as a general matter have been unwilling to recognize a claim for clergy malpractice.¹³⁷ Insofar as the court is following that line of cases

("Although the church autonomy doctrine provides a shield against excessive government incursion on internal church management, it clearly cannot be applied blindly to all disputes involving church conduct or decisions. The doctrine is implicated only in those situations where 'the alleged misconduct is "rooted in religious belief."'") (citing *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002)).

¹³³ 692 A.2d 441 (Me. 1997).

¹³⁴ *Id.* at 442 ("Mr. Swanson returned and indicated to Morin that his wife's infatuation was with the priest. Morin acknowledged that this seemed to be true. He told Mr. Swanson, however, that he was trained to handle the situation and was 'working with Mrs. Swanson on this issue.' After this meeting, Mr. Swanson discovered the sexual relationship between Father Morin and his wife. Mrs. Swanson then filed a complaint for divorce.").

¹³⁵ *Id.* at 445.

¹³⁶ *Id.* (emphasis added).

¹³⁷ *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir. 1998) ("[S]tate courts have 'rejected uniformly' claims for 'clergy malpractice.'" (citing *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J., concurring))); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001) ("[C]ourts throughout the United States have uniformly rejected claims for clergy malpractice under the First Amendment." (citing *Dausch*, 52 F.3d at 1432 (Ripple, J., concurring in part and dissenting in part, joined by Coffey, J., concurring))); see also Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1112 (2003) ("Courts have universally rejected claims of clergy malpractice."); Emily C. Short, Comment, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 183 (2004) ("To date, no U.S. court has accepted clergy malpractice as a viable tort for fear

when denying a claim for “negligent pastoral counseling,”¹³⁸ the holding would not be as robust as its language would indicate.¹³⁹ However, there is reason to believe that the Maine court was not merely rejecting a cause of action for clergy malpractice.

To see why that is so, it is helpful to consider some of the cases that the *Swanson* court believed were wrongly decided. When noting that other courts had held that the Constitution does not bar a claim for negligent supervision or retention in appropriate circumstances,¹⁴⁰ the court cited cases involving child molestation¹⁴¹ as well as non-consensual sexual conduct with an adult parishioner,¹⁴² and then suggested that those “courts have failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions.”¹⁴³ Such a comment suggests that the court’s focus was not on clergy malpractice, since those other decisions did not involve that claim. Further, when citing to a case suggesting that secular interests were not sufficiently important to justify overriding religious interests, the *Swanson* court cited to a ministerial exception case.¹⁴⁴ But ministerial exception cases may implicate issues involving who best understands church doctrine that simply would not be involved in a suit brought by an innocent third party against the church for negligent supervision of one of its employees.¹⁴⁵ Given the range of types of cases in which the *Swanson* court believed that courts had failed to appreciate the kind of neutrality imposed on the state,

of problems with excessive governmental entanglement with religion or difficulty in defining an appropriate standard of care.”).

¹³⁸ *Swanson*, 692 A.2d at 442 (“Plaintiffs filed their complaint in the Superior Court seeking damages against Morin for intentional and negligent infliction of emotional distress and negligent pastoral counseling.”).

¹³⁹ For example, the New Jersey Supreme Court detailed some of the difficulties in recognizing such a claim including describing the relevant standard of care. *See* *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997).

¹⁴⁰ *Swanson*, 692 A.2d at 445 (“We recognize that there is limited authority for permitting negligent supervision claims to proceed when the plaintiff alleges that the defending church knew that the individual clergyman was potentially dangerous.”) (citing *Konkle v. Henson*, 672 N.E.2d 450 (Ind. App. 1996); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991)).

¹⁴¹ *See Konkle v. Henson*, 672 N.E.2d at 450–51; *Jones by Jones*, 591 N.Y.S.2d at 927.

¹⁴² *See Byrd*, 565 N.E.2d at 584.

¹⁴³ *Swanson*, 692 A.2d at 445.

¹⁴⁴ *Id.* (“Although “[t]he Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test, the Court has also concluded that certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests.” (citing *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990))).

¹⁴⁵ *But see* *L.L.N. v. Clauder*, 563 N.W.2d 434, 447 (Wis. 1997) (holding that First Amendment bars a negligent supervision claim regarding the actions of a hospital chaplain for the same reason that such a claim would be barred for supervision of a priest, namely, that the “claim would not involve consideration of neutral principles of law, [but] [i]nstead . . . would require a court to interpret church law and policies, which would result in excessive governmental entanglement with religion”).

it is difficult to imagine what was allegedly so special about the facts of the case before the court that drove the decision. Instead, it seems that the *Swanson* court believed that “neutrality” required fairly robust immunity.

2. Cases Involving Alleged Victimization of Children

As a general matter, courts have been more willing to impose liability on churches when they were on actual or constructive notice that ministers in their employ were sexually abusing children.¹⁴⁶ However, even in cases involving child molestation, courts have sometimes refused to permit liability to be imposed against a church.

In *Schmidt v. Bishop*,¹⁴⁷ a New York federal district court addressed whether a church could be liable for the alleged sexual abuse of a child by a clergyman.¹⁴⁸ The court noted that “tort claims can be maintained against clergy, for such behavior as negligent operation of the Sunday School van, and other misconduct not within the purview of the First Amendment, because unrelated to the religious efforts of a cleric.”¹⁴⁹ However, because the case involved religious counseling, the court was unwilling to recognize a cause of action for clergy malpractice, because such an analysis “would require the court to define the standard of care of a reasonable clergy person.”¹⁵⁰ Further, courts in general have worried about possible difficulties in knowing where to draw the line between permitted and prohibited conduct in a counseling setting.¹⁵¹

Yet, as the *Schmidt* court itself recognized, it would seem to require “no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children.”¹⁵² Further, other courts have expressed confidence that they

¹⁴⁶ See *supra* notes 131–35 and accompanying text.

¹⁴⁷ 779 F. Supp. 321 (S.D.N.Y. 1991).

¹⁴⁸ *Id.* at 324 (discussing contact between a bishop and a twelve-year-old girl, which “did not involve rape or sexual intercourse, but essentially reflects the crime of sexual abuse in the second degree”).

¹⁴⁹ *Id.* at 327.

¹⁵⁰ Enderle v. Trautman, 2001 WL 1820145, at *4 (D.N.D. 2001) (citing *Schmidt*, 779 F. Supp. at 328).

¹⁵¹ See, e.g., *Schmidt*, 779 F. Supp. at 328 (“The difficulty is that this Court, and the New York courts whose authority we exercise here, must consider not only this case, but the next case to follow, and the ones after that, before we embrace the newly invented tort of clergy malpractice.”).

¹⁵² *Id.*; see also *Jones v. Trane*, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992) (“[A]lthough defendants persistently assert First Amendment protection, none makes any suggestion that the alleged sexual misconduct of defendant Trane is a part of the tenets or practices of the Roman Catholic Church, or that restraint on it by the imposition of civil liability will in any way intrude on the free exercise of religion to an extent protected by the First Amendment.”); Marci A. Hamilton, *The “Licentiousness” in Religious Organizations and Why It Is Not Protected under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953, 956 (2010) (“Typically, the sexual abuse practices are not supported by the religious beliefs of these organizations.”). It is precisely because religious groups are

can impose liability against a member of the clergy for child molestation, and nonetheless “can provide a brake to the slide when needed”¹⁵³ and thereby avoid “venturing on a slippery slope into questions of liability impossible and unconstitutional to determine.”¹⁵⁴

Consider the pastor who negligently operates the Sunday school van. Suppose that the pastor has several accidents. Presumably, the religious institution itself might be liable for permitting him to continue subjecting his passengers to harm if it took no steps to prevent some of those harms, e.g., by arranging to have someone else drive the van or, perhaps, by failing to warn parishioners about the dangerous driving habits of the individual.

In *Gibson v. Brewer*,¹⁵⁵ the Missouri Supreme Court offered a somewhat surprising analysis of the conditions under which a religious organization might be liable for the negligent actions of its employees. The court first noted that “[r]eligious organizations are not immune from civil liability for the acts of their clergy,”¹⁵⁶ explaining that “a church can be vicariously liable for the negligent operation of a vehicle by a pastor in the scope of employment.”¹⁵⁷ However, the court distinguished between the liability that would be imposed under the “doctrine of *respondeat superior*, [where] a principal is liable for its agent’s acts that are (1) within the scope of employment and (2) done as a means or for the purpose of doing the work assigned by the principal,”¹⁵⁸ and liability because of negligent hiring and retention, which “necessarily involve interpretation of religious doctrine, policy, and administration.”¹⁵⁹

Yet, it is not clear why a negligent retention claim must involve interpretation of religious doctrine or administration. At issue in *Gibson* was whether the Diocese could be held liable for a priest having taken inappropriate liberties with a child.¹⁶⁰ After

not claiming that molestation is in accord with religious beliefs that it seems implausible to believe that permitting liability will have disproportionate effects on certain religions over others. For that claim, see Kelty, *supra* note 41, at 1141–42 (“[S]ince each denomination holds its own distinct set of beliefs, this tort will disproportionately impact some religions more than others, depending on which actions the court deems negligent.”). For those religious groups that would claim molestation is a religious practice, *Prince v. Massachusetts* suggests that the religious claim will not win the day. 321 U.S. 158, 170 (1944). For a discussion of *Prince*, see *infra* notes 214–17 and accompanying text.

¹⁵³ *Jones by Jones*, 591 N.Y.S.2d at 931.

¹⁵⁴ *Id.*

¹⁵⁵ 952 S.W.2d 239 (Mo. 1997).

¹⁵⁶ *Id.* at 246 (citing *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995)).

¹⁵⁷ *Id.* (citing *Garber v. Scott*, 525 S.W.2d 114, 119–20 (Mo. Ct. App. 1975)).

¹⁵⁸ *Id.* at 245–46 (citing *Henderson v. Laclede Radio, Inc.*, 506 S.W.2d 434, 436 (Mo. Ct. 1974)).

¹⁵⁹ *Id.* at 246–47.

¹⁶⁰ *Id.* at 243 (“Father Brewer, a Catholic priest and an associate pastor, invited Michael Gibson and a friend to spend the night and watch movies in the church Rectory. Michael alleges that early in the morning, Brewer touched or fondled him in a sexual, offensive, and unwelcome manner.”).

informing the Diocese of their concerns, the parents were told that “they should ‘forgive and forget’ and get on with their lives.”¹⁶¹ The court noted that all parties agreed that “intentional sexual misconduct and intentional infliction of emotional distress are not within the scope of employment of a priest, and are in fact forbidden,”¹⁶² which was why vicarious liability could not be imposed. But the court did not explain why religious doctrine, policy, and administration would be implicated were the Diocese potentially liable for its failure to adequately supervise a priest with respect to his sexual relations with children.

It might be argued that a diocese would be less likely to hire or more likely to fire someone who was believed more likely to take advantage of innocent parishioners. While that is true, the same might be said regarding a priest with an erratic driving record. Further, the *Gibson* court distinguished between the negligent and intentional failure to provide adequate supervision, reasoning that “[r]ecognizing the tort of intentional failure to supervise clergy, in contrast, does not offend the First Amendment.”¹⁶³

Yet, imposing liability for the intentional failure to provide adequate supervision means that church hiring, supervision and retention of clergy might well be affected by potential liability. This, too, would affect church administration.

The *Gibson* court implied that the Constitution precludes a state from punishing a church for its failure to include a particular secular criterion within its ecclesiastical hiring or retention criteria, namely, whether that individual is likely to abuse parishioners, but the Constitution does not preclude a state from punishing a church for its failure to include a different secular criterion within its ecclesiastical hiring or retention criteria, namely, that the clergyperson is substantially certain to harm parishioners.¹⁶⁴ Yet, no reason is offered to believe that the Constitution affords immunity to a church for negligent but not intentional failures to adequately supervise employees, and the same number of innocent people might be victimized in either kind of scenario.

Suppose that a church learns that particular priests have abused children and then covers up those misdeeds.¹⁶⁵ Suppose further that no steps are taken to assure that those priests would either have no contact with children or would only have supervised contact so that further harms would not occur.¹⁶⁶ Would such a failure to adequately

¹⁶¹ *Id.*

¹⁶² *Id.* at 246 (citing *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991)).

¹⁶³ *Id.* at 248.

¹⁶⁴ *See supra* notes 158–64 and accompanying text.

¹⁶⁵ *See, e.g.*, *Smith v. O’Connell*, 986 F. Supp. 73, 75 (D.R.I. 1997) (“At the heart of these cases are allegations that, during the 1970’s and early 1980’s, when the plaintiffs were minors, they were sexually molested by the defendant priests. It is further alleged, *inter alia*, that prior to such molestation, the hierarchy defendants knew that the priests were pedophiles and not only failed to take appropriate preventative action, but also actively concealed the priests’ sexual misconduct.”).

¹⁶⁶ *Cf. id.* at 78 (“[N]othing in those affidavits suggests that canon law precludes hierarchical officials from taking appropriate action to *prevent* priests, who are known pedophiles, from sexually abusing children. The affidavits make no reference to any limitation on the

supervise be considered intentional or merely negligent? Some courts would characterize the church's behavior in such a scenario as an intentional failure to supervise whereas others would characterize it as a negligent failure to supervise.¹⁶⁷

While some express approval of the *Gibson* approach,¹⁶⁸ it should be applauded by no one, given the difficulties in determining what counts as an intentional rather than negligent failure to supervise. Further, either might be claimed to intrude on the autonomy of the church with respect to its hiring and retention policies, and nothing in the Constitution or the Court's jurisprudence suggests that the difference between negligent and intentional failure to supervise is where the line should be drawn when determining whether a religious institution is potentially liable for its failure to afford adequate supervision over its employees.¹⁶⁹

At least one consideration that courts have included within their analyses of whether neutral principles of law can be used to evaluate negligent supervision claims is whether the challenged conduct is itself prohibited by law. For example, a Connecticut court discussed whether a negligent supervision claim could be brought in a case involving the allegation that a priest had "sexually abused, sexually assaulted and sexually exploited the plaintiffs while they were minors."¹⁷⁰ The court expressed

Bishop's power to determine a priest's assignment or to closely monitor and supervise the priest's activities.").

¹⁶⁷ Compare *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791, 795 (N.Y. App. Div. 1997) ("If, as the plaintiffs allege in their bill of particulars, the infant plaintiffs and/or Jimenez himself made statements to other priests at St. Leo's Church or Our Lady of Sorrows Church giving them notice of Jimenez's conduct, the plaintiffs may have causes of action sounding in negligent retention and negligent supervision."), with *Gibson*, 952 S.W.2d at 248 ("[T]he Gibsons have alleged that the Diocese knew that harm was certain or substantially certain to result from its failure to supervise Brewer, and thus have stated a cause of action for intentional failure to supervise clergy."). Consider the test proposed by Professors Lupu and Tuttle. See Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. REV. 1789, 1866 ("We suggest that supervising officials be held liable only when they fail to act on knowledge creating substantial grounds for concern that a member of the clergy will use his position to commit sexual crime or to take sexual advantage of a member of the faith."). It is not clear whether the "substantial grounds" test would be better understood as an intentional failure to supervise, a negligent failure to supervise, or somewhere in between. They seem to be recommending a negligent supervision test that is more onerous than it would be in other contexts. See *id.* at 1870–71.

¹⁶⁸ See *Schwartz & Appel*, *supra* note 43, at 477 ("[T]he Missouri Supreme Court's reasoning in *Gibson v. Brewer* supplies a constitutionally sensitive approach by distinguishing between ordinary negligent supervision and intentional failure to supervise."); *Chopko*, *supra* note 137, at 1119 ("[T]he 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.").

¹⁶⁹ *Kelty*, *supra* note 41, at 1151–54 (noting that intentional torts such as intentional failure to supervise have only been recognized as constitutionally valid claims against churches by state courts and lower federal courts).

¹⁷⁰ *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967, 969 (Conn. Super. Ct. 1998).

confidence that it could “apply neutral principles of tort law to conduct that is expressly prohibited by the laws of this state,”¹⁷¹ and explained that to “rule otherwise would result in declaring the state and its inhabitants unable to seek redress when clergy are accused of endangering the welfare and safety of minors, regardless of state law in place to protect such minors from the very abuses alleged.”¹⁷² Were the Church afforded immunity in this kind of case, the State would be putting it in a preferred position.¹⁷³

Some courts do afford immunity to churches in these kinds of scenarios. In *Ayon v. Gourley*,¹⁷⁴ a federal district court examined the potential liability of an Archdiocese when it had allegedly been expressly informed that a priest had sexually abused a boy.¹⁷⁵ The court explained that the “choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution.”¹⁷⁶ With respect to the negligent supervision claim, the court believed that it would be necessary to delve into the “unique relationship conceived by church doctrine.”¹⁷⁷ The *Ayon* court did not explain whether the same rationale would preclude claims based on “breach of a fiduciary duty[] [or] negligent use of motor vehicles.”¹⁷⁸ Either of these claims might also

¹⁷¹ *Id.* at 970. However, some states prohibit members of the clergy from having sexual relations with someone being counseled if that person is not a spouse. *See, e.g.*, *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 259 (Minn. Ct. App. 2003) (discussing MINN. STAT. § 609.344(1)(l)(ii) (2000), which provides, in relevant part that “A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor is . . . a member of the clergy, the complainant is not married to the actor, and . . . the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid or comfort in private. Consent by the complainant is not a defense.”). The Minnesota court determined that the statute passed muster as long as the only issue for the court to determine was “the limited issue of whether the existence of the relationship precludes the counselee’s consent to sexual battery.” *See id.* at 263; *see also* James T. O’Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 61 (1994) (“The courts recognize that the perpetrator’s power over the victim can render consent legally impossible.”). With respect to the negligent retention claim, the court reasoned that such a claim was not precluded because “[t]he inquiry is only into the reasonableness of the employer’s supervision to prevent a cleric’s sexual penetration of persons who are receiving ongoing, private spiritual advice, aid, or comfort from a cleric.” *Olson*, 661 N.W.2d at 265.

¹⁷² *Rosado*, 716 A.2d at 973.

¹⁷³ *See id.* at 971 (“To hold otherwise would impermissibly place a religious leader in a preferred position in our society.” (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998)) (internal quotation marks omitted)).

¹⁷⁴ 47 F. Supp. 2d 1246 (D. Colo. 1998).

¹⁷⁵ *See id.* at 1250.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* *But see* Mark E. Chopko, *A Response to Timothy Lytton: More Conversation Is Needed*, 39 CONN. L. REV. 897, 900 (2007) (“No one could dispute that the crimes committed by individual clerics created liability for those dioceses and religious orders whose leadership knew of these activities beforehand.”).

¹⁷⁸ *See Smith v. Privette*, 495 S.E.2d 395, 397 (N.C. Ct. App. 1998).

implicate religious views regarding the unique relationship between a church and its minister and thus would seem beyond civil review, foreseeable harm to known individuals notwithstanding.

A North Carolina appellate court rejected that “resolution of the Plaintiffs’ negligent retention and supervision claim requires the trial court to inquire into the Church Defendants’ reasons for choosing Privette to serve as a minister.”¹⁷⁹ If, instead, the Church knew or had reason to know of the minister’s “propensity to engage in sexual misconduct,”¹⁸⁰ and that misconduct was not “part of the tenets or practices of the . . . Church,”¹⁸¹ then the First Amendment would not bar the claim.¹⁸² The Church is permitted to make its own decisions about who is most qualified to spread the religion’s message, but that does not mean that the church is immune from liability when failing to take reasonable steps to avoid the imposition of foreseeable harm.

In *C.J.C. v. Corporation of Catholic Bishop of Yakima*,¹⁸³ the Washington Supreme Court distinguished between the duties that might be owed to congregants as a general matter and the duties that might be owed “where a ‘special relationship’ exists.”¹⁸⁴ Where the victim and the defendant have such a special relationship, there may be “a duty to protect the victim against foreseeable harms, including harms intentionally caused.”¹⁸⁵

The court then examined whether “there is a special relationship between a church and the children of its congregation that gives rise to a duty to protect the children against foreseeable harms.”¹⁸⁶ The congregants’ children are “delivered into the custody and care of a church and its workers, whether it be on the premises for services and Sunday school, or off the premises at church sponsored activities or youth camps.”¹⁸⁷

¹⁷⁹ *Id.* at 398.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*; see also *J.M. v. Minn. Dist. Council of Assemblies of God*, 658 N.W.2d 589, 597–98 (Minn. Ct. App. 2003) (“The standard used to determine negligent retention is based on neutral principles of law. The court need not investigate the role of pastor within church hierarchy or the nature of Dvorscak’s employment with the church in order to resolve a claim of negligent retention. The unfitness alleged is the secular act of sexually violating a parishioner, not any alleged unfitness that relates to Dvorscak’s duties as a pastor. The court only need evaluate what the church knew or should have known about Dvorscak’s propensity to sexually violate parishioners with whom he was counseling, and, if there was such knowledge, whether the church’s actions were reasonable considering the problem.”).

¹⁸³ 985 P.2d 262 (Wash. 1999).

¹⁸⁴ *Id.* at 273 (citing *Nivens v. 7–11 Hoagy’s Corner*, 943 P.2d 286 (Wash. 1997)).

¹⁸⁵ *Id.* Had there been no finding of a special relationship, the court might have held that no duty was triggered. See, e.g., *Bouchard v. N.Y. Archdiocese*, No. 04 Civ. 9978(CSH) 2006 WL 1375232, at *6 (S.D.N.Y. 2006) (“Plaintiff’s allegations do not make out the existence of any sort of special relationship between the Church Defendants and Plaintiff beyond that general relationship between a church or religious body and a congregant. That general relationship is insufficient in law to support the finding of a fiduciary duty.”).

¹⁸⁶ *C.J.C.*, 985 P.2d at 273–74.

¹⁸⁷ *Id.* at 274.

Because as “a matter of public policy, the protection of children is a high priority”¹⁸⁸ and because in many respects churches are relevantly similar to schools,¹⁸⁹ the court concluded that “churches (and other religious organizations) [are] subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm.”¹⁹⁰ A church is not immune from liability for failing to protect those whom it has a duty to protect as “long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs”¹⁹¹ The court was thus able to limit the number of individuals to whom a special duty was owed.

The Florida Supreme Court in *Malicki v. Doe*¹⁹² noted the conflict among the state and federal courts with respect to whether religious institutions can be held liable for negligent hiring, supervision, or retention of clergy.¹⁹³ At issue in *Malicki* were the actions of Father Malicki, who had allegedly “fondled, molested, touched, abused,

¹⁸⁸ *Id.*; see also Kelly W.G. Clark et al., *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 483 (2006) (“[W]hen a claim of religious liberty is balanced against the interests of society, the ‘compelling interests’ of protecting children from sexual exploitation by trusted adults and rendering justice override the claim of religious liberty.”) (footnote omitted). Courts have been less sympathetic when the relationship was between adults and arguably consensual. See, e.g., *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 824 (Mich. Ct. App. 1999) (“Stripped of religious overtones, plaintiff essentially alleges that a person pursued her, an adult woman, gained her trust, and eventually engaged in a consensual sexual relationship with her, albeit that her consent was given when she was in a vulnerable position.”); *S.H.C. v. Lu*, 54 P.3d 174, 181 (Wash. Ct. App. 2002) (“The obvious distinction between this case and *C.J.C.* is that this case involves allegations by an adult of sexual improprieties. In contrast, *C.J.C.* involved such improprieties against children, a group protected by criminal statutes and other public policies.”); see also *Lupu & Tuttle*, *supra* note 167, at 1794 (“Because the public interest in clergy behavior is weaker in cases involving consenting adults than in cases involving children, state intervention in the affairs of religious organizations is harder to justify in the adult cases.”).

¹⁸⁹ *C.J.C.*, 985 P.2d at 274 (noting that in “many respects, the activities of a church, and the corresponding duties legitimately imposed upon it, are similar to those of a school”); see also Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11, 45 (2005) (“[A] religious institution with custody of children during a religious retreat would likely have a duty of reasonable care to protect them from the tortious acts of a third party to the same extent that a secular institution would. The same is true of the relationship between a religious school and its students during school hours.”).

¹⁹⁰ *C.J.C.*, 985 P.2d at 274; see also *John Doe (1) v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1193 (D. Colo. 2006) (“[R]easonable employers take reasonably prudent measures to avoid child abuse by their employees, whether the venue of employment is a church, school, or camp.”).

¹⁹¹ *C.J.C.*, 985 P.2d at 277 (citing *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998)).

¹⁹² 814 So. 2d 347 (Fla. 2002).

¹⁹³ *Id.* at 358–59.

sexually assaulted and/or battered' the minor and adult parishioners."¹⁹⁴ The Church argued that it was not liable as a matter of law, "because the inquiry for negligent hiring and supervision necessarily implicates church practices and doctrine."¹⁹⁵ Basically, the argument was that "the First Amendment bars the tort claims at issue here because evaluating the 'reasonableness' of their decisions regarding the hiring or supervision of Malicki would excessively entangle the civil courts in the internal workings of the church."¹⁹⁶

When arguing that the First Amendment barred the imposition of liability, the Church was not claiming that "the underlying acts of its priest in committing sexual assault and battery was [sic] governed by sincerely held religious beliefs or practices."¹⁹⁷ Nor did the Church claim that its failure "to exercise control over Malicki was because of sincerely held religious beliefs or practices."¹⁹⁸ Because there was no claim that religious principles had in any way been compromised, the *Malicki* court concluded that "the Free Exercise Clause is not implicated in this case because the conduct sought to be regulated; that is, the Church Defendants' alleged negligence in hiring and supervision is not rooted in religious belief."¹⁹⁹ Even were there "an 'incidental effect of burdening a particular religious practice,'"²⁰⁰ the court reasoned that the tort claim was "not barred because it is based on neutral application of principles of tort law."²⁰¹ The application of neutral tort principles gives "no greater or lesser deference to tortious conduct committed on third parties by religious organizations than . . . to tortious conduct committed on third parties by non-religious entities."²⁰² The *Malicki* court implied that its immunizing the Church from tort liability would "risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment."²⁰³ Thus, not only do the Religion Clauses not immunize a church from liability for the foreseeable tortious behavior of their employees, but those Clauses arguably preclude a state from extending such immunity.

In *Roman Catholic Diocese of Jackson v. Morrison*,²⁰⁴ the Mississippi Supreme Court explained why it rejected that the First Amendment precluded tort liability on the basis of negligent hiring or retention, noting that the "Diocese may ordain whomever it concludes is worthy, and it may engage in whatever religious speech it desires."²⁰⁵

¹⁹⁴ *Id.* at 353.

¹⁹⁵ *Id.* at 360.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 360–61.

¹⁹⁸ *Id.* at 361.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (citing *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 365.

²⁰⁴ 905 So. 2d 1213 (Miss. 2005).

²⁰⁵ *Id.* at 1222.

However, “if it has specific knowledge that children within its care are in danger of sexual molestation, and if it has the authority, power and ability to protect those children from that known danger of abuse and molestation, it is for a jury to determine whether it took reasonable steps to protect the children.”²⁰⁶ The court noted that the Diocese would not be protected were it to allow a priest to drive the Sunday school van when it knew that he would be a danger on the roads, e.g., because of the medication he was taking,²⁰⁷ when the “diocese [c]ould simply prevent the priest from driving an automobile under the circumstances.”²⁰⁸

If the Mississippi Supreme Court were to accept that the First Amendment imposed the limitations suggested by the Diocese, then the court would have to accept that religious doctrine and practice could “impose or suggest different requirements for the protection of children from sexual molestation, than the requirements generally imposed by society,”²⁰⁹ and that such practices were immunized from liability. The court could not countenance such a result.²¹⁰ One need only consider *Prince v. Massachusetts*²¹¹ to see that the State is not required to stand by and allow children to be harmed, because “neither rights of religion nor rights of parenthood are beyond limitation.”²¹² The *Prince* Court pointed out that with respect to legislation designed to prevent harm to children, “[i]t is too late now to doubt that legislation appropriately designed to reach such evils is within the state’s police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.”²¹³

²⁰⁶ *Id.*

²⁰⁷ *Id.* (“[W]ere a hypothetical diocese to allow a hypothetical priest to drive an automobile belonging to the diocese, knowing the priest had taken medication which severely hampered his ability to drive safely, we doubt any serious argument could be made that the diocese was immune from civil liability to an innocent person injured by the priest in an automobile accident.”); see also Carl H. Esbeck, *Tort Claims against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 5 (1986) (discussing tort claims “arising out of automobile accidents by persons on church business . . . for which churches have rightly been liable since the abandonment of the charitable immunity defense”).

²⁰⁸ *Morrison*, 905 So. 2d at 1222.

²⁰⁹ *Id.* at 1229–30; see also *Turner v. Roman Catholic Diocese of Burlington, Vt.*, 987 A.2d 960, 974 (Vt. 2009) (“Common law, not ecclesiastical principles, establishes the scope of that duty. The duty owed by defendant to protect minors from sexual abuse is not different from the duty owed by other institutions to which the common law applies. We find that there was no excessive entanglement, and thus, no violation of the Establishment Clause.”).

²¹⁰ *Morrison*, 905 So. 2d at 1229–30; Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 237 (2007) (“If church autonomy is at its strongest when everything occurs internally, then what is meant by church autonomy is immunity from tort and criminal law when the religious organization is involved in hiding criminal activity from the authorities and its own members, whose children are at risk It turns the First Amendment into a shield for the most heinous of behaviors, as it perpetuates the unacceptable behavior.”).

²¹¹ 321 U.S. 158 (1944).

²¹² *Id.* at 166.

²¹³ *Id.* at 168–69.

Certainly, it is fair to suggest that imposing such a requirement adds a secular element to the organization's religious criteria. But it is not as if that secular standard would supplant all of the religious requirements; instead, it would be an add-on and thus does not seem to impose the kind of difficulty that some allege.²¹⁴

In *Redwing v. Catholic Bishop for Diocese of Memphis*,²¹⁵ the Tennessee Supreme Court addressed the validity of a tort action brought by Norman Redwing who claimed to have been abused as a boy by Father Guthrie.²¹⁶ Alleging that “the Diocese was aware or should have been aware that Fr. Guthrie was ‘a dangerous sexual predator with a depraved sexual interest in young boys’ and that the Diocese misled him and his family regarding its ‘knowledge of Father Guthrie’s history and propensity for committing sexual abuse upon minors,’”²¹⁷ Redwing sued the Diocese for its negligence “with regard to the hiring, retention, and supervision of Fr. Guthrie.”²¹⁸ Rejecting the Diocese’s claims that Tennessee civil courts lacked “subject matter jurisdiction over Mr. Redwing’s negligent hiring, retention, and supervision claims, as well as his breach of fiduciary duty claims,”²¹⁹ the Tennessee court explained that civil courts are not barred from adjudicating “matters involving religious institutions, as long as the court can resolve the dispute by applying neutral legal principles and is not required to employ or rely on religious doctrine to adjudicate the matter.”²²⁰ Because the Diocese had “not asserted any religious foundation for the alleged conduct upon which Mr. Redwing’s claims are based,”²²¹ and, on the contrary, had asserted that “any such actions would be directly contrary to the beliefs, teachings, and principles of the Roman Catholic Church,”²²² the Tennessee court held that the Diocese’s defense was unavailing.²²³ Basically, where a religious institution is on notice that its employed

²¹⁴ See Schwartz & Appel, *supra* note 43, at 476 (“Defining that standard runs into the same dilemma as in clergy malpractice: the alternatives are imposition of a uniform, state-created secular standard or a religion-specific spiritual standard. Either injects a court into the constitutionally prohibited area of religious self-governance.”); Kelty, *supra* note 41, at 1123 (“[B]ecause claims of negligent hiring and supervision require creating and applying a standard of care, courts are forced to interpret religious doctrine and perhaps prefer the practices of one religion over another.”).

²¹⁵ 363 S.W.3d 436 (Tenn. 2012).

²¹⁶ *Id.* at 442 (“Mr. Redwing alleges that Fr. Guthrie began to take advantage of him. He states that Fr. Guthrie began to touch him in inappropriate ways and eventually inveigled him into a physical relationship that included oral sex.”).

²¹⁷ *Id.* at 442–43.

²¹⁸ *Id.* at 442.

²¹⁹ *Id.* at 450.

²²⁰ *Id.* at 450–51 (citing *Jones v. Wolf*, 443 U.S. 595, 602–07 (1979)).

²²¹ *Id.* at 452.

²²² *Id.*

²²³ *Id.* at 453 (“[B]ased on the record before us, it appears that Mr. Redwing will be able to pursue his negligent hiring, supervision, and retention claims without asking the trial court to resolve any religious disputes or to rely on religious doctrine.”).

ministers are likely to violate their religious beliefs and practices by molesting children, the institution is not afforded immunity from tort liability merely because it is a religious entity.

C. Hosanna-Tabor and Institutional Liability

Hosanna-Tabor was decided in 2012, and it is too early to tell whether that decision will have implications for the way that courts decide cases involving church liability for the tortious behavior of their ministerial employees. A further complicating factor is that, prior to *Hosanna-Tabor*, some courts had already held that religious institutions were not liable for negligent hiring, retention, or supervision of their employees,²²⁴ so a court now issuing such a holding might be doing so because that was the governing precedent in the jurisdiction rather than because of *Hosanna-Tabor*'s reasoning or result. Nonetheless, there is reason to think that courts might read *Hosanna-Tabor* as offering more robust constitutional protection than had previously been thought to exist.

Consider *Erdman v. Chapel Hill Presbyterian Church*,²²⁵ which involved a church elder's claim against a church for negligent supervision and retention.²²⁶ Angela Erdman was the Church's "executive for stewardship."²²⁷ In that capacity, she was responsible for "facilitating the development of vision, goals, and strategies for Chapel Hill, providing strategic leadership, helping to make decisions regarding the financial and development strategies and goals of Chapel Hill, and creating a major donor development plan for Chapel Hill."²²⁸ Ms. Erdman had expressly agreed "to be bound by the disciplinary procedures of Chapel Hill and to seek reconciliation and resolve disputes according to church procedure."²²⁹

Ms. Erdman reported to the senior pastor, Dr. Toone, who was responsible for evaluating her work.²³⁰ Ms. Erdman was concerned that certain tours of "religious and historical significance"²³¹ led by Dr. Toone would jeopardize the Church's tax-exempt status.²³² Toone assured her that the church was not at risk,²³³ but Erdman disagreed with that assessment.²³⁴ Their disagreements escalated, culminating in Toone's accusing

²²⁴ See, e.g., *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997).

²²⁵ 286 P.3d 357 (Wash. 2012).

²²⁶ See *id.* at 362.

²²⁷ *Id.* at 360.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 360–61.

²³⁴ *Id.*

her of “insubordination” and “impugn[ing] his reputation”²³⁵ and Erdman’s accusing Toone of attempting to intimidate her.²³⁶

Eventually, Erdman requested and was granted medical leave due to stress.²³⁷ While on leave, her attorney allegedly threatened to sue the Church if Erdman were not offered an acceptable severance package.²³⁸ When her physician cleared her to return to work, she was placed on administrative leave without pay while the Church investigated matters.²³⁹ Eventually she was fired, allegedly based on Toone’s recommendation.²⁴⁰

At least one question was whether Ms. Erdman was a minister for First Amendment purposes, especially given that she had taken “ordination vows.”²⁴¹ However, the trial court refused to dismiss the cause of action on that basis, believing that it did not have sufficient information to decide whether Erdman was in fact a minister for purposes of the exception.²⁴² Instead, the trial court held “a civil court cannot consider claims submitted to a hierarchically organized church’s ecclesiastical tribunal . . . includ[ing] the negligent retention and negligent supervision claims.”²⁴³ The intermediate appellate court reversed the trial court’s dismissal of the negligent supervision and retention claims and the dismissal of the Title VII claim.²⁴⁴

The Washington Supreme Court noted that *Hosanna-Tabor* provides guidance as to who qualifies as a minister and that the ministerial exception is applicable in Title VII actions,²⁴⁵ but refused to find that “Ms. Erdman was a minister of the Church and therefore subject to the constitutionally based ministerial exception.”²⁴⁶ The court instead remanded the Title VII claim for further proceedings.²⁴⁷ The court then held that “as a matter of law permitting the negligent retention and negligent supervision claims to go forward violates [the Church’s] First Amendment right to select and supervise its ministers and its First Amendment right, as part of a hierarchical religious organization, to deference to decisions made by its ecclesiastical tribunals.”²⁴⁸

The court’s justification for that position was somewhat surprising. For example, the court noted that a “religious organization must be able to choose and retain its

²³⁵ *Id.* at 361.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 360, 362.

²⁴² *Id.* at 362 (“[T]he trial court determined that it lacked sufficient facts to decide whether Ms. Erdman was herself a minister subject to the ‘ministerial exception’ to a Title VII suit and declined to rule in the defendants’ favor on this claim.”).

²⁴³ *Id.*

²⁴⁴ *See id.*

²⁴⁵ *See id.* at 362–63.

²⁴⁶ *Id.* at 362.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 363.

spiritual leaders,²⁴⁹ which is of course correct.²⁵⁰ However, by implying that Erdman was a spiritual leader whose retention was a matter best left to church discretion, the court was suggesting that Erdman was a minister for First Amendment purposes, which is exactly what the court refused to hold.

The *Erdman* court also suggested that the Church's "highest ecclesiastical tribunal's decisions on issues of discipline, faith, and ecclesiastical law must be given deference by a civil court."²⁵¹ That, too, was correct, but Erdman's claim that the Church was liable for negligent hiring or retention was based on civil rather than church law—she was not asking the civil court to offer an authoritative doctrinal interpretation but instead was asking the court to apply secular law to a particular set of facts and determine whether a tort had been committed.²⁵²

The Washington Supreme Court recognized that churches can be held liable for the tortious acts of their ministers, citing with approval *Gibson*'s point that a church might be liable for the negligent driving practices of its minister.²⁵³ "But claims of negligent retention and supervision pose serious First Amendment concerns that often weigh against allowing a tort claim to proceed in a civil court."²⁵⁴ As support for the contention that serious First Amendment concerns are thereby implicated, the *Erdman* court wrote: "As the Court's analyses in *Kedroff* and *Hosanna-Tabor* indicate, negligent retention and supervision claims implicate a religious organization's First Amendment right to select its clergy."²⁵⁵ Yet, neither of those courts dealt with negligent retention or supervision; indeed, the *Hosanna-Tabor* Court expressly stated: "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."²⁵⁶

Hosanna-Tabor's limitation on its own decision notwithstanding, the *Erdman* court gave that decision a robust reading. Indeed, in summing up its position, the Washington court wrote that "negligent supervision claims should not be permitted to go forward because it is virtually impossible to adjudicate such claims without inquiring into existing church doctrines and beliefs in order to establish duty, the standard of care, and what constitutes violation of the standard . . ."²⁵⁷ Yet, courts need not do that at all.

²⁴⁹ *Id.*

²⁵⁰ *See, e.g., Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) ("[A religious organization's] choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution. It is one of the most important exercises of a church's freedom from government control.").

²⁵¹ *Erdman*, 286 P.3d at 363.

²⁵² *See id.* at 362.

²⁵³ *See id.* at 364 ("[T]he Missouri Supreme Court noted, a church . . . can be vicariously liable for its pastor's negligent operation of a vehicle while in the scope of employment.") (citing *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997)).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 710 (2012).

²⁵⁷ *Erdman*, 286 P.3d at 367.

They instead are using secular standards regarding duty, the standard of care, and when the applicable standard had not been met.²⁵⁸

The *Erdman* court seemed to recognize that courts are only applying secular rules, but then suggested that it is “problematic”²⁵⁹ when the State imposes “state-established standards onto a religious organization after the fact without regard to the organization’s religious doctrines, beliefs, and customs.”²⁶⁰ Yet, it is not as if the law is changing after the fact—standard, long-established rules regarding negligent supervision are being employed. Further, it is, of course, true that the State should not be taking into account religious doctrines, beliefs, and customs when applying secular laws to allegedly tortious practices, because taking those doctrines, beliefs, and customs into account might well involve preferential treatment or excessive entanglement.

The *Erdman* court expressly rejected use of the “neutral principles of law”²⁶¹ approach in this context, instead suggesting that “[a] civil court is not entitled to interfere with or intervene in a church’s selection and supervision of its ministers . . . when civil claims of negligent retention and supervision are asserted,”²⁶² citing *Hosanna-Tabor* in support of its rejection of the neutral principles approach.²⁶³ But *Hosanna-Tabor* had not been addressing the potential liability of churches when their employed ministers engaged in allegedly tortious activities; instead, *Hosanna-Tabor* was precluding ministers from suing their employers.²⁶⁴

Justice Chambers in his concurring and dissenting opinion explained that “the First Amendment does not vest churches with immunity from criminal or tort liability,”²⁶⁵ for example, “no exercise of religious faith condones the sexual exploitation of children.”²⁶⁶ Here, he was worried about the breadth of the *Erdman* opinion, which he understood to be suggesting that “no claim of negligent retention or supervision, no matter how appalling the conduct, could ever go forward against a church based on the misconduct of its clergy.”²⁶⁷ He noted that *Hosanna-Tabor* “neither considers that proposition nor supports that conclusion.”²⁶⁸ Indeed, “*Hosanna-Tabor* considered whether the ministerial exception doctrine applied to bar a petitioner’s claims because *she herself* was a minister; not because, as here, someone else was.”²⁶⁹ The important difference emphasized by Justice Chambers was that *Hosanna-Tabor* “did not

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 368.

²⁶² *Id.*

²⁶³ *Id.* at 367–68.

²⁶⁴ *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012).

²⁶⁵ *Erdman*, 226 P.3d at 372 (Chambers, J., dissenting in part and concurring in part).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 375.

purport to consider whether a *tortfeasor's* ministerial status was relevant to whether a civil claim may be pursued against a church for negligent retention and supervision.”²⁷⁰

Not only did *Hosanna-Tabor* not even consider the “neutral principles” of law approach,²⁷¹ but the Washington Supreme Court had already recognized that a negligent retention or supervision claim against a church could proceed in child molestation cases.²⁷² Justice Chambers had this case in mind when chastising the majority for having offered such a broad opinion.²⁷³

Justice Chambers was correct that *Hosanna-Tabor* did not address whether neutral principles of law could be used in a case in which a church was sued for its negligence in employing a minister who acted tortiously and the Court certainly should not be characterized as having offered such a holding. However, some of the *Hosanna-Tabor* Court’s broad language could be inferred to support such a position, and it remains to be seen whether the *Erdman* court’s mistaken reading of the *Hosanna-Tabor* holding has nonetheless captured its spirit.

CONCLUSION

Hosanna-Tabor recognized that the First Amendment incorporates a ministerial exception that precludes ministers from suing their religious employers for allegedly discriminatory employment practices. That decision overextended the past jurisprudence by holding that the First Amendment not only bars civil courts from offering authoritative constructions of religious doctrines, procedures, and practices, but also precludes courts from applying secular laws to religious institutions’ allegedly wrongful employment practices. To make matters worse, the Court muddied the waters with respect to who counts as a minister for purposes of the First Amendment, thereby potentially exposing more individuals to wrongful employment practices without the possibility of being afforded a remedy.

Hosanna-Tabor potentially creates yet another difficulty. By implying that the First Amendment immunizes church selection of its ministers from tort liability because such decisions are the church’s alone, the Court might be understood to be implying that churches are immune from suit even when they knowingly employ individuals who are

²⁷⁰ *Id.*

²⁷¹ *Id.* at 376 (“The lead opinion also suggests that the United States Supreme Court rejected the neutral principles approach in *Hosanna-Tabor*, 132 S. Ct. 694. Lead opinion at 368. That is a remarkable reading of the text. *Hosanna-Tabor* never mentions ‘neutral principles.’ It does not discuss the leading neutral principles cases, *Jones*, 443 U.S. 595 and *Mem’l Presbyterian Church*, 393 U.S. 440. Nor did it have any reason to.”)

²⁷² See *supra* notes 186–94 and accompanying text (discussing *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 985 P.2d 262 (Wash. 1996)).

²⁷³ See *Erdman*, 286 P.3d at 373 (Chambers, J., dissenting in part and concurring in part) (“[W]e have already allowed cases against churches involving clergy sexual misconduct to go forward.”) (citing *C.J.C.*, 985 P.2d at 277).

likely to commit tortious behavior. While there is no basis for such a position in the jurisprudence preceding *Hosanna-Tabor*, and the Court expressly claimed to be limiting its focus to employment actions brought by ministers, the Court's careless use of language makes such a reading possible. Such a holding is fearful to contemplate, especially given the vast array of employees who might qualify as ministers for First Amendment purposes under the Court's possibly very inclusive criteria. At its first opportunity, the Court must clarify that the First Amendment does not incentivize religious institutions to turn a blind eye to the tortious behavior of their employees. Else, the health and well-being of innocent victims, society, and religious institutions themselves are almost guaranteed to decline.