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I. INTRODUCTION

One puzzle of religious institutional autonomy and the free exercise of religion is, of course, this: In 1990, the Supreme Court held in *Employment Division v. Smith* that, in most cases, religious beliefs create no special constitutional right to an exemption from "neutral, generally applicable" laws.[1] The Court in *Smith* largely discarded a balancing test it had embraced in *Sherbert v. Verner* almost thirty years earlier, under which laws that imposed "incidental burden[s] on the free exercise of . . . religion" would be struck down unless justified by a "'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[2] Justice Scalia's majority opinion in *Smith* concluded that, while the compelling government interest requirement in other areas of constitutional law establishes "constitutional norms," its role in Free Exercise jurisprudence since *Sherbert* only created a "constitutional anomaly"[3] by granting religious believers a personalized exemption from otherwise valid laws.[4] In some ways, *Smith* returned the Court to the position it had famously taken as early as 1879 in *Reynolds v. United States*.[5]

But still sitting in an often-overlooked corner of religion and law jurisprudence is a distinct set of doctrines, covering a variety of issues that come under the general rubric of institutional autonomy, by which American churches and religious communities *are* insulated

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1. 494 U.S. 872, 880 (1990) (rejecting the argument that the Free Exercise Clause requires an exemption from a state drug law for sacramental use of peyote by members of the Native American Church).

2. 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

3. *Smith*, 494 U.S. at 885–86.

4. *Id.* at 878–79.

5. 98 U.S. 145, 166–67 (1879).

from the full reach of the neutral, generally applicable laws to which comparable nonreligious institutions are subject. For example, religious communities are generally not subject to antidiscrimination laws when it comes to the employment of clergy,[6] nor are they subject to the same requirements regarding the structure of corporate governance.[7]

So, the question arises, does religious institutional autonomy survive *Smith*?[8] More to the point—and putting aside the lawyerly game of narrowing and distinguishing precedent—does institutional autonomy survive the theory that underlies *Smith*?[9]

This is an important practical question: I devote the last half of this Article, for example, to the implications of religious institutional autonomy for legal responses to the current clergy sexual abuse scandal. In one sense, though, it is also a silly question, even as amended. The doctrine of institutional autonomy was in place long before *Sherbert*. *Watson v. Jones*,[10] the *Marbury* of institutional autonomy, dates from the same era as *Reynolds* itself, and courts recognized the doctrine, whether as a para-constitutional or

6. See *infra* note 75 and accompanying text.

7. See *infra* notes 104–15 and accompanying text.

8. *See generally* Lee Boothby, *Religious Freedom in the United States Following* City of Boerne v. Flores, 2 NEXUS, Fall 1997, at 111, 117–18 ("*Smith* in no way encroaches upon the long line of church autonomy cases."); G. Sidney Buchanan, *The Power of Government To Regulate Class Discrimination By Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1231 (1994); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1906 (1998); Christopher R. Farrell, Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109, 127 (2003).

9. For a strong argument that *Smith* is incompatible with traditional institutional religious autonomy, see David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 264–65 (1995) (arguing that deferring to a religious polity "represents one type of constitutionally compelled religious exemption. . . . Where an organized religion seeks a free exercise exemption, the case presents somewhat different issues than an individual believer's exemption claim. Nonetheless, individual exemption and institutional exemption cases follow from a common premise. In both types of cases, claimants seek exemptions from the application of neutral laws or legal principles. If one abandons free exercise exemptions, then one also should reject church autonomy principles. In church autonomy cases, courts cannot both give independent meaning to the Free Exercise Clause, and reject constitutionally compelled religious exemptions." (citations omitted)) .

10. 80 U.S. 679 (1871) (affirming, as a common law principle, that courts should defer to ecclesiastical governing bodies in adjudicating intrachurch property disputes). *Watson*, of course, reflected a trend that had already been developing in other courts. For a broad historical treatment of the development of ideas about religious institutional autonomy in American law, see Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211 (1991).

constitutional principle, during the entire period between *Reynolds* and *Sherbert*.[11] Moreover, *Smith* cites the leading institutional autonomy cases approvingly, and Justice Scalia's opinion suggests no sense of contradiction.[12] Also, lower court decisions have tended to affirm the continued, if sometimes compromised, vitality of institutional autonomy.[13]

11. *See, e.g.*, Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Shepard v. Barkley, 247 U.S. 1 (1918); Romanian Orthodox Missionary Episcopate v. Trutza, 205 F.2d 107 (6th Cir. 1953); Sims v. Greene, 160 F.2d 512 (3d Cir. 1947); First English Lutheran Church v. Evangelical Lutheran Synod 135 F.2d 701 (10th Cir. 1943); Satterlee v. United States, 20 App. D.C. 393 (D.C. 1902); Williams v. Jones, 61 So. 2d 101 (Ala. 1952); State *ex rel.* Soares v. Hebrew Congregation "Dispersed of Judah," 31 La. Ann. 205 (La. 1879); Jenkins v. New Shiloh Baptist Church, 56 A.2d 788 (Md. 1948); Carter v. Papineau, 111 N.E. 358 (Mass. 1916); Baxter v. McDonnell, 49 N.E. 667 (N.Y. 1898); Gross v. Wieand, 25 A. 50 (Pa. 1892); First Baptist Church v. Fort, 54 S.W. 892 (Tex. 1900).

To be sure, the development of institutional autonomy was complicated and inconsistent, particularly in the state courts. That history is well beyond the scope of this Article. My point here is simply that this development had little to do, one way or the other, with the path of free exercise law from *Reynolds* to *Sherbert*. Indeed, as late as 1968, the Georgia courts (along with others) still adhered to a version of the "departure from doctrine" method for resolving church property disputes. *See* Presbyterian Church v. Eastern Heights Presbyterian Church, 159 S.E.2d 690 (Ga. 1968). The United States Supreme Court, in reversing, relied on the path of autonomy jurisprudence without thinking it necessary or relevant to cite *Sherbert*. *See* Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

12. In the course of describing, and approving, the strands of free exercise doctrine that did *not* involve *Sherbert*-style exemptions from neutral, generally applicable laws, the Court wrote that the government may not "lend its power to one or the other side in controversies over religious authority or dogma." Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976); *Mary Elizabeth Blue Hull*, 393 U.S. at 445–52; *Kedroff*, 344 U.S. at 95–119).

13. *See, e.g.*, Bryce v. Episcopal Church, 289 F.3d 648, 656 (10th Cir. 2002) (concluding that *Smith* "does not undermine the principles of the church autonomy doctrine"); Combs v. Cent. Tex. Annual Conference, 173 F.3d 343, 349 (5th Cir. 1999) (distinguishing "between the two strands of free exercise cases—restrictions on an individual's actions that are based on religious beliefs and encroachments on the ability of a church to manage its internal affairs" and concluding that "*Smith*'s language is clearly directed at the concerns raised in the first strand of free exercise law," which are "quite different" from those implicated in the second strand); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–62 (D.C. Cir. 1996) (observing that *Smith* did not affect the longstanding rule precluding civil courts from hearing "employment discrimination suits by ministers against the church or religious institution employing them"); Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996) (holding that both the Free Exercise and Establishment Clauses precluded a minister from suing a church for discrimination under Title VII; distinguishing *Smith*); Brazauskas v. Fort Wayne-South Bend Diocese, 796 N.E.2d 286, 293 (Ind. 2003) (noting that *Smith* "did not implicate the church autonomy doctrine," though the doctrine has limits, and that *Smith* does make clear that the mere invocation of a church governing document does not "automatically insulate the faithful from . . . neutral laws of general applicability").

The better question, then, is not whether institutional autonomy survives *Smith*, but rather why it survives—how, to what extent, and in what form. In other words, why, how, to what extent, and in what form, does a special, constitutionally required regime for churches survive *Smith*'s apparent rejection of the proposition that the Constitution demands a special regime for the free exercise of religion in general?

One obvious response is that *Smith*, even read broadly, merely removes institutional autonomy from the realm of free exercise, but that the doctrine still survives under the Establishment Clause.[14] This cannot, however, be either the whole answer or the best answer. First, it is counterintuitive to imagine that institutional autonomy is not related to principles of free exercise.[15] After all, even countries without establishment clauses—for that matter, countries with established churches—respect religious institutional autonomy.[16] If the truth be told, institutional autonomy is, strictly speaking, neither a matter of free exercise nor of establishment;[17] rather, it can most

14. *See, e.g.*, Carl Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 471–73 (2002); Ira C. Lupu & Robert Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1812–19.

15. *See Kedroff*, 344 U.S. at 116 (constitutionalizing the autonomy doctrine as "a part of the free exercise of religion against state interference"); Doug Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

16. *See generally* CHURCH AUTONOMY: A COMPARATIVE SURVEY (Gerhard Robbers ed., 2001).

17. Institutional autonomy doctrine originated in common-law rather than constitutional reasoning. In *Kedroff*, 344 U.S. 94, the Supreme Court elevated those common law principles to constitutional status under the rubric of the Free Exercise Clause, but it saw no need to justify them anew in terms drawn from its other free exercise cases. *Id. at* 115–16 ("*Watson v. Jones*, although it contains a reference to the relations of church and state under our system of laws, was decided without depending upon prohibition of state interference with the free exercise of religion. . . . The opinion radiates, however, 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. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." (citations omitted)); *cf. Mary Elizabeth Blue Hull*, 393 U.S. at 446 (describing language in *Watson v. Jones* as having "a clear constitutional ring").

This history is still relevant because it confirms that religious institutional autonomy is supported by legal threads distinct from, though woven with, the other headings of the Constitution's treatment of religion. *Cf.* Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of* Nomos *and* Narrative, 8 CARDOZO STUD. L. & LITERATURE 15, 21 (1996) (discussing "constitutional glare"—"the tendency of constitutional talk to obstruct the

sensibly be understood as a distinct third rubric, grounded in the structural logic of the relation between the juridical expressions of religion and the state.[18] But in our constitutional dispensation, the least antipositivist way to express that distinct logic is by situating institutional autonomy at the intersection of the macroconcerns of the Establishment Clause and the microconcerns of the Free Exercise Clause.[19] To try to find refuge for it in one clause as against the other is just false.

Second, trying to ground religious institutional autonomy solely in the Establishment Clause would necessarily transform it, changing its focus, recasting its principles, and very likely leading it to different results in specific cases.[20] After all, the rubric of institutional autonomy covers a range of discrete and diverse problems, each of which would deserve separate analysis under a calculus driven solely by Establishment Clause concern. In the end, to put it bluntly, there might just be less institutional autonomy if institutional autonomy were only an expression of disestablishment. Of course, if *Smith* did actually remove the Free Exercise Clause from the autonomy equation, then we might need to conclude that autonomy, though it survives *Smith*, is weakened and diluted. But that premise need not be conceded.

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normative work done by the rest of law, and to obscure the degree to which constitutional law itself is embedded in larger narratives and traditions").

18. For my own arguments along these lines, see Perry Dane, *The Varieties of Religious Autonomy*, *in* CHURCH AUTONOMY, *supra* note 16, at 117 [hereinafter Dane, *The Varieties of Religious Autonomy*] ("[M]any controversies arising under our 'Establishment Clause' . . . can be understood as efforts to work out principles of separation and deference at a categorical or 'wholesale' level, while many issues arising under our 'Free Exercise Clause' can be understood as arising out of the need to adjust those principles at the individual or 'retail' level. . . . The problem of 'religious autonomy' straddles the Establishment and Free Exercise Clauses, and therefore straddles the efforts at drawing 'wholesale' and 'retail' boundaries between religion and the state."). For my more general musings on the nature and structure of the religion clauses, see Perry Dane, *Constitutional Law and Religion*, *in* A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 113 (Dennis Patterson ed., 1996) [hereinafter Dane, *Constitutional Law and Religion*].

19. *See* Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980) (arguing that religious institutional autonomy arises out of the interaction of the Free Exercise and Establishment Clauses).

20. For example, how would statutes providing for the special management of religious boards, *see infra* notes 104–15 and accompanying text, or the ministerial exception, *see infra* note 75 and accompanying text, be justified under the *Lemon* test's secular purpose prong? *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (requiring all statutes to have a "secular legislative purpose").

Finally, even if institutional autonomy were properly rooted solely in the Establishment Clause, it would still be important to consider the implications of *Smith*. The two religion clauses, after all, are not hermetically sealed off from each other, and the holding in *Smith* could reasonably be understood to have at least some spillover effect on Establishment Clause jurisprudence, and therefore on institutional autonomy doctrine. Indeed, some commentators have already suggested that *Smith*'s redefinition of free exercise doctrine, combined with cognate developments in the Court's Establishment Clause cases, suggests a new commitment to a broad principle of "neutrality" or "equality" in the constitutional treatment of religion.[21] If this commitment really is at the heart of it all, it might very well implicate the nature and breadth of religious institutional autonomy as well. Indeed, one could even try to link this sort of putative commitment to neutrality across the spectrum of religion and law issues to a yet broader focus on themes of equality and neutrality in modern American constitutional jurisprudence[22]—a focus that is not only apparent in the role played by the Equal Protection Clause in contemporary constitutional consciousness,[23]

21. *See, e.g.*, Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998); Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1005–06 n.2; Scott C. Idelman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 252–55 (2000); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (discussing "Neutralism" as a possible general principle in the constitutional treatment of religion); Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 549 (2002) [hereinafter Lupu & Tuttle, *Sites of Redemption*].

22. As Ira Lupu and Robert Tuttle put it,

> Neutralism captures the arc of recent jurisprudence of the Religion Clauses, as well as deeper constitutional logic. In an era in which equality norms dominate constitutional understandings, claims of disparate treatment—whether the exclusion of religious entities from government-controlled benefits, or the exemption of such entities from government regulation—demand justification.

Lupu & Tuttle, *Sites of Redemption*, *supra* note 21, at 549 (citations omitted); *cf.* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1059 (1996) (arguing that "placing equality at the pinnacle of constitutional values is the only way to assure that other important constitutional values," including freedom of religion, "remain protected").

23. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* Grutter v. Bollinger, 539 U.S. 306, 331 (2003) ("We are a 'free people whose institutions are founded

but is also central to the focus on antidiscrimination norms in the modern evolution of such scattered areas of doctrine as the "dormant Commerce Clause"[24] and intergovernmental tax immunity.[25]

The rest of this Article argues against this effort to subject religious institutional autonomy to the acid principle of "neutrality." More broadly, it tries to articulate and describe a still-vigorous doctrine of religious institutional autonomy even in the shadow of a weakened doctrine of free exercise.

In Part II of the Article, I argue that religious institutional autonomy, in its most full and vigorous form, is entirely consistent with *Smith*. Moreover, institutional autonomy is consistent with *Smith* not only in a narrow, technical sense, but also with respect to the bedrock principle for which *Smith* stands. In Part III, I briefly consider a related challenge from within institutional autonomy jurisprudence itself—that is, the idea of "neutral principles of law"

upon the doctrine of equality.'" (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967))); Romer v. Evans, 517 U.S. 620, 623 (1996) (stating that the Equal Protection Clause enforces the Constitution's "commitment to the law's neutrality where the rights of persons are at stake").

The precise meanings of "equality" and "neutrality," and whether these abstract ideas have genuine meaning or are only placeholders for substantive rights, are issues that have been hotly debated among constitutional scholars and political theorists. For the debate in its most classic form, compare Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), with Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 273 (1983) ("Equality is a central theme in the native idiom of American culture. Lawyers and judges will go on using egalitarian rhetoric not merely to exploit the constitutional doctrine founded on the text of the equal protection clause but because they want to address live legal issues in the language that most naturally expresses the substantive values underlying their claims and decisions."). I will touch on this puzzle again in Part V of this Article.

24. *See generally* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) (defining contemporary Dormant Commerce Clause doctrine to allow state regulations that have incidental effects on interstate commerce as long as those regulations are evenhanded rather than protectionist); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (noting the "distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986).

25. *See generally* Barker v. Kansas, 503 U.S. 594 (1992) (modern doctrine of intergovernmental tax immunity emphasizes prohibition on discriminatory taxes); Davis v. Mich. Dep't of the Treasury, 489 U.S. 803 (1989) (discussing the move from older cases that emphasized absolute state immunity against federal taxation to more recent jurisprudence that allows federal government broad taxing authority against states as long as such taxes are exacted equally from private persons upon the same subject matter); New York v. United States, 326 U.S. 572 (1946) (same).

made famous in the *Jones v. Wolf*[26] decision. "Neutral principles of law" sounds suspiciously like *Smith*'s "neutral, generally applicable" language, but I argue that they have no necessary connection with each other. In Part IV, I briefly explore the boundary between the realm of institutional autonomy and the realm of free exercise by saying something about the hardest test case we now confront—the responsibility of churches for sexual abuse by clergy. Part V concludes by tying together some of the themes of the Article. It also suggests why the invocation of "neutrality" is both an understandable (and in some contexts, correct) impulse in discussions of religion and law, and yet a distracting snare.

II. NEUTRAL LAWS AND THE JURISPRUDENCE OF EXEMPTIONS

Smith is inapplicable to the traditional doctrines of religious institutional autonomy because those doctrines are not jurisprudentially "anomalous" in the specific sense that concerned the Court in *Smith*.[27] Subpart A explains why, regardless of whether or not there should be a constitutional right to religion-based exemptions (a right in which I happen to believe), the Court in *Smith* was at least correct that such a right would be "anomalous" in the constitutional order. Subpart B explains why religious institutional autonomy is not "anomalous" in *Smith*'s sense; it is, instead, to coin a phrase, entirely "omalous."

A. Why Exemptions Are Anomalous

The beginning of wisdom here is to recognize that *Smith* is not really a case about neutral, generally applicable laws. To describe it that way is to look through the telescope from the wrong end. Rather, *Smith* deals, as did *Reynolds*, with the specific problem of religion-based exemptions. A claim to a religion-based exemption arises only when a specific religious belief conflicts with the demands

26. 443 U.S. 595 (1979).

27. My argument in this Part draws on a longer paper that I have been working on for some time. Perry Dane, Duty and Province, and the Rule of Law (working title, in progress). That paper tries to make sense of, and critique, both *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–1 to –4 (1994)), unconstitutional to the extent that it created a statutory right to religious-based exemptions from state laws), in the context of a larger discussion of legal pluralism and constitutional method. For present purposes, my aim is narrower—to say something about *Smith* and its implications for institutional autonomy.

of a particular, otherwise unobjectionable, secular law, and the religious believer seeks relief from that law. Moreover, *Smith*'s hostility to religion-based exemptions ultimately turns, not merely on a view of the Free Exercise Clause, but on a specific, essentially *jurisprudential* concern about the nature of all constitutional rights and constitutional adjudication.

The *Smith* opinion specifically relied on the famous argument in *Reynolds* that to require religion-based exemptions would "be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[28] *Smith* characterized religion-based exemptions as a "private right to ignore generally applicable laws."[29] The Court then declared that the then-governing test for religion-based exemptions produced not a "constitutional norm" at all, but rather a "constitutional anomaly."[30] That last phrase—"constitutional anomaly"—is crucial. Justice Scalia's claim is that a reading of the Free Exercise Clause that creates a general prima facie claim to religion-based exemptions is not merely wrong, as this or that application of either the Free Speech or Equal Protection Clause might be wrong, but that it is fundamentally outside the bounds of a well-ordered system of constitutional rights. And his contrast of norms and anomalies is not only alliterative,[31] it confirms that, in Justice Scalia's view, religion-based exemptions, by permitting "every citizen to become a law unto himself," violate the rule of law itself.

The bracing truth here, which those of us who support religion-based exemptions deny at our peril, is that Scalia is at least half right. Religion-based exemptions *are* a "constitutional anomaly." Justice Brennan in *Sherbert*, and for that matter Justice O'Connor in her own opinion in *Smith*, were just wrong when they tried to assimilate

28. *Smith*, 494 U.S. at 879 (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

29. *Id*. at 886.

30. *Id*. The then governing test was the compelling-interest/balancing test of *Sherbert*. *See supra* note 3 and accompanying text.

31. When I first read the *Smith* majority opinion, and admired its prose, if not its reasoning, I was particularly struck by the subtlety of Justice Scalia's juxtaposition of "norm" and "anomaly," assuming, as Scalia might have, that "anomalous" derived etymologically from the "negation of the Greek 'nomos' and the Latin 'norma.'" ANTHONY J. STEINBOCK, HOME AND BEYOND: GENERATIVE PHENOMENOLOGY AFTER HUSSERL 132 (1995). Unfortunately, "anomalous" actually derives from the Greek prefix "an," meaning "not," and "homalos," meaning "even," "level," or "smooth." *Id*.; *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 75 (4th ed. 2000). Of course, even false etymology can be powerfully suggestive.

a right to religion-based exemptions to other categories of constitutional rights.[32]

Religion-based exemptions are constitutionally anomalous in several respects. For present purposes, I want to focus on two of the most fundamental.

1. The nature of the claim

The first of these anomalies regards the nature of the claim. In a typical challenge to the constitutionality of a law, the core argument is that there is something wrong with the law itself[33]—some discrepancy between the terms of the act and the terms of the Constitution.[34] Moreover, the claim that a law is unconstitutionally defective must typically rest on some "objective" argument, by which I mean only that it cannot rest on a merely idiosyncratic objection.[35] The Constitution establishes limits on the normative

32. Sherbert v. Verner, 374 U.S. 398, 404–05 (1963); *Smith*, 494 U.S. at 891–903 (O'Connor, J., concurring).

33. One account of the "basic structure" of constitutional law argues that "Constitutional rights are rights against rules. A constitutional right [only] protects the rights-holder from a particular rule"; it does not grant the rights-holder the freedom to act in a particular way or to obtain a particular outcome. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998) (citations omitted). This formulation is narrower than the one I have in mind, but it does point in the same direction.

34. Chief Justice Marshall's account in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), still provides the paradigmatic image of judicial review:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 178.

35. In particular, I do not mean by "objective" anything as narrow as "true" or "clear" or "determinate" or "neutral." Nor do I mean by "objective" anything like "textual" or "acontextual." Ordinary constitutional analysis, for example, often does and should take social facts into account. Even subjective perceptions can factor into ordinary constitutional analysis, but only if they are, in the sense just outlined, "objectively" validated. *See, e.g.*, Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654 (1995) ("The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'"); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (conducting an Establishment Clause inquiry in terms of whether an "objective observer" would find that the government had "endorsed" religion). Thus, even in *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the Court (to much criticism) seemed to rely heavily on the empirical claim that segregation

authority of legislatures and other relevant actors. To say that an act is unconstitutional is to say that those limits have been transgressed. To put it another way, a finding that a law is unconstitutional typically assumes that the legislature could have, in principle, altered the law in some meaningful way[36] so as to render it constitutional.[37]

This constitutional analysis is obvious when a law is challenged "on its face," but it is no less true when a law is challenged "as applied." A finding that a law is only unconstitutional "as applied" simply means that its defect only extends to certain sets of cases[38] or

produced "feeling[s] of inferiority" in black students, *id*. at 494, it is clear that the Court saw such stigma not as an idiosyncratic reaction, but as a social fact built into the system of *de jure* segregation. *Brown* has from the start been read to stand for a set of principles broader than any particular collection of psychological data. *See generally* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

36. By use of the qualifier "meaningful," I mean only to emphasize that I have in mind something more than a vacuous provision such as "Nothing in this Act shall be construed to abridge any rights guaranteed by the Constitution." *Cf., e.g.*, 2 U.S.C. § 1607(a) (2000); 16 U.S.C. § 5206 (2000); 18 U.S.C. § 112(d) (2000); 18 U.S.C. § 248(d) (1) (2000). This is not to say that there is anything wrong with such provisions, or that they cannot be helpful to the analysis of a law. *Cf.* CISPES v. FBI, 770 F.2d 468, 474 (5th Cir. 1985) (observing that though "such a provision cannot substantively operate to save an otherwise invalid statute," it can "validate a [constitutional] construction of the statute").

37. *See* Adler, *supra* note 33, at 3 ("To say that X's treatment pursuant to a rule R violates X's 'constitutional rights,' or that the treatment is 'unconstitutional'. . . . entails [] that there exists moral reason to repeal or amend the rule R.").

I am making an analytic point here, not suggesting that a finding of unconstitutionality requires anything like "fault" or "intent." In particular, my account of typical constitutional analysis does not rest on specific doctrines such as, say, the Supreme Court's unwillingness to look to disparate racial impact as the basis for a claim that an otherwise "neutral" law is unconstitutional. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The best arguments for disparate impact claims, after all, also argue that there is an "objective," meaningfully avoidable, defect in a given practice or legal structure, or in a larger web of practices and structures, even if that defect is not apparent from the words of an official text or the provable conscious intent of official actors. *See, e.g.*, Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983).

38. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding an amendment to the Communications Act regulating commercial telephone communications valid as applied to obscene speech but invalid as applied to indecent speech); Texas v. Johnson, 491 U.S. 397, 404 n.3 (1989) (striking down a Texas flag-burning statute as applied to persons engaging in political expression); *cf.* United States v. Salerno, 481 U.S. 739, 745 (1987) (suggesting that, at least outside the First Amendment context, a statute that is valid in some applications but not others can only be subject to as-applied, not facial, challenges). *But cf.* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235

is only apparent in the light of certain empirical findings.[39] But the defect is still "objective," and the law could still, at least in principle, have been written in some meaningfully different way to avoid that defect. The same general point can be made when what is at stake is not the constitutionality of a law but some official act, such as a search or seizure. Ultimately, ordinary constitutional analysis requires some decision about whether the relevant actor has crossed an "objective" constitutional line.

a. The counterexample of free speech. To see the principle of objectivity in relief, consider free speech doctrine. Freedom of expression is a notoriously complex problem. Some verbal expression, such as agreeing to commit a crime, is treated like ordinary conduct outside the scope of the freedom of speech.[40] And some nonverbal expressive conduct—such as flag burning[41] and certain forms of nude dancing[42]—though not literally speech, are in whole or in part protected as if they were.[43] But though the question

(1994) (arguing that a distinction between facial and as-applied challenges is misleading and unhelpful).

39. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (rejecting a facial Establishment Clause challenge to the Adolescent Family Life Act, but remanding for a determination of whether, in practice, grants under the Act impermissibly flowed to "pervasively sectarian" institutions); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (distinguishing between regulatory statutes that constitute "takings" of property on their face and those that can be proven to effect a "taking" only in the context of specific factual circumstances).

40. *See generally* Chaplinksy v. New Hampshire, 315 U.S. 568, 571–72 (1942); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 57–58, 80–85 (1989); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1988). There is much room for debate in the categorical exclusion of particular categories of expression, such as obscenity, from the protection of free speech. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1. Moreover, the legal construction of the line between protected and unprotected verbal expression has been famously fluid. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (clarifying the line between protected advocacy and unprotected incitement); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (reinterpreting the constitutional status of defamation). My own purpose here is merely descriptive.

41. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas. v. Johnson, 491 U.S. 397 (1989).

42. *See* Schad v. Mount Ephraim, 452 U.S. 61 (1981).

43. *See generally* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525; Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844 (1997).

of whether a particular species of nonverbal conduct should be treated as "speech" is always potentially in play, contemporary free speech doctrine ultimately grounds the answer in objective, if contingent and contextual, social fact and not merely in the subjective, idiosyncratic claims of individuals.[44] A good deal of conduct will simply never be treated as protected by the Free Speech Clause. For example, "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."[45] The reason is *not* that a physical assault could not in some sense be "expressive." It is rather that this society's robust, but nevertheless socially constructed, lexicon of genuinely communicative gestures includes the destruction of symbolically freighted objects (draft cards, flags, crosses, and so on), but not the physical invasion of human beings.

The centrality of this objective social inquiry helps explain the typical shape that a certain genre of modern free speech litigation has taken: a series of questions about whether this or that behavior is, under one or another rubric,[46] protected expression. For instance, can flag burning be a form of speech?[47] Can sleeping in public parks

Of course, deciding that a form of nonverbal conduct should share some or all of the protections of "speech" is only the beginning of the analysis. The question remains whether the government is impermissibly infringing on that "speech." *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89–91 (1982).

44. *See generally* Waldman, *supra* note 43, at 1844 (positing that courts in symbolic-speech cases investigate the "traditional social meaning" of the category of conduct at issue); Tiersma, *supra* note 43, at 1557–58 (arguing that nonverbal conduct can only be the functional equivalent of speech if it has meaning as a matter of either cultural convention or specific context).

Some commentators have rejected this emphasis on conventional social meaning as unworkable, unnecessary, or incoherent. They disagree, however, on whether this should lead to more protection of certain forms of nonverbal conduct, *see, e.g.*, Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973), or much less protection, *see, e.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993).

45. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

46. That is to say, the question is whether the behavior qualifies as "pure speech" or as "expressive conduct."

47. *See* Texas v. Johnson, 491 U.S. 397, 405–06 (1989) ("That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country. . . . [In this case,] [t]he expressive, overtly political nature of [the defendant's] conduct was both intentional and overwhelmingly apparent.").

be a form of speech?[48] Can begging be a form of speech?[49] Can sitting, in itself, be a form of speech?[50] Is wearing a mask a form of speech?[51] Is a loosely organized ethnic parade a form of speech?[52] This is the stuff, not only of free speech analysis, but of ordinary constitutional analysis more generally.

b. The distinct logic of exemptions. The point concerning the typical form of constitutional analysis is simple, even trivial. Even many constitutional claims arising under the Free Exercise Clause fall into this typical pattern.[53] It is thus all the more remarkable that claims for religion-based *exemptions*—a distinct subset of free exercise claims—have a radically different analytic structure.

Consider, for example, a person who reads the Biblical ban on graven images[54] to bar the possession of photographs and, therefore, raises a free exercise claim against a rule requiring that she have a

48. *Compare* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 592 (D.C. Cir. 1983), *rev'd on other grounds*, 468 U.S. 288 (1984) ("[T]here can be no doubt that the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go."); *id.* at 622 (Scalia, J., dissenting) ("I write separately . . . flatly to deny that sleeping is or can ever be speech for First Amendment purposes.").

49. *Compare, e.g.*, Loper v. N.Y. City Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) ("It cannot be gainsaid that begging implicates expressive conduct or communicative activity."), *with* Young v. N.Y. City Transit Auth., 903 F.2d 146, 153 (2d Cir. 1990) ("The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.").

50. *See, e.g.*, City of Seattle v. McConahy, 937 P.2d 1133, 1139 (Wash. Ct. App. 1997) (noting that neither "[sitting and] reading a book with a lap full of leaflets," nor "sitting with . . . friends eating pizza," is a form of protected expressive conduct).

51. *See generally* Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991).

52. *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) ("Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them."), *rev'g* Irish-American Gay, Lesbian, and Bisexual Group of Boston v. City of Boston, 636 N.E.2d 1293, 1299 (Mass. 1994) ("parade was a civic, nonexpressive celebration").

53. *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down a municipal ban on animal sacrifices); McDaniel v. Paty, 435 U.S. 618 (1978) (striking down a state bar on clergy serving as delegates to the state constitutional convention).

54. "You shall not make for yourself a sculptured image." *Exodus* 20:4. Jews and many Christians count this verse as part of the Second Commandment; Catholic and Lutheran tradition assigns it to the First Commandment. *See* THE TORAH: A MODERN COMMENTARY 533–35 (W. Gunther Plaut ed., 1981); Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471, 474–76 (1998).

photo on her driver's license.[55] No reasonable "objective" analysis would suggest that there is anything "wrong" or defective with the photo license rule. Rather, the only problem with the statute is that it happens to conflict, by accident, with a particular religious norm. Thus, the religious objector's precise legal claim is *not* that the rule is unconstitutional as such, either on its face or "as applied," but only that she should be *exempt* from it.

It might be said that what is "wrong" with the photo license rule is that it does not provide for religious exemptions. But that is an empty claim because it does not distinguish this rule from any other law.[56] The fact is that *any* law that touches on individual conduct, however otherwise inoffensive or innocuous that law might be, could in principle come into accidental conflict with one or another religious norm.

This indeed is precisely Justice Scalia's point in the "parade of horribles" he trots out in *Smith*:

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[57]

55. *See*, *e.g.*, Dennis v. Charnes, 805 F.2d 339 (10th Cir. 1984); Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court*, 472 U.S. 478 (1985).

56. Many legal rules do provide for religion-based exemptions. I have before me as I write this the Pennsylvania driver's license renewal form, which includes the following "special note":

> When requesting a religious exemption, a letter must accompany this application. The letter must include:
>
> A. The request for the exemption;
>
> B. The name of the religious group to which the applicant is affiliated.
>
> C. A statement that the religion's belief forbids the taking of photographs; and,
>
> D. The applicant's signature.

Pa. Dep't of Transp., Form DL-143: Non-Commercial Driver's License Application for Renewal, *available at* www.padmv.org (last visited Dec. 1, 2004). As Justice Scalia rightly points out in *Smith*, however, this does not, in itself, mean that other states are constitutionally required to provide such exemptions. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

57. *Smith*, 494 U.S. at 888–89 (citations omitted).

The point of this catalog, as Scalia emphasizes, is not to suggest that courts would grant exemptions in all these instances, but to say something about the open-ended, constitutionally anomalous, logical structure of a vigorous doctrine of religion-based exemptions.[58] There simply is no litany of boundary questions in religion-based exemptions doctrine analogous to that in free speech doctrine, even though the range of behaviors for which free exercise protection has been sought is much wider. As the courts have long recognized, whether a behavior or practice is religiously significant must be left to religious judgment rather than "objective" social construction.[59] Indeed, Scalia's argument in *Smith* explicitly exploited the rejection of "objective" limits on which behaviors can count as religious. "[P]recisely because we value and protect . . . religious divergence," he wrote, "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[60] Scalia's powerful charge, then, is that claims to religion-based exemptions, rather than defining general limits on the reach of law, simply demand a "private right to ignore" the law, and thus threaten the very idea of law.

2. The nature of the claimant

This first anomaly of religion-based exemptions has as its corollary a further anomaly regarding who may invoke the right to an exemption.

58. *Id*. at 889 n.5.

59. The courts in the free exercise context *have* inquired, in "objective" terms, into whether a claimant's motivation is "sincere" and is genuinely "religious." *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). But both these inquiries go to the nature of a claimant's motivation and not to the character of the conduct the claimant is seeking to protect. Therefore, neither alters my basic point that, while free exercise doctrine recognizes that *any* conduct could, in principle, have religious significance, free speech doctrine will only treat as "speech" what the rest of us are willing to consider as "speech."

60. *Smith*, 494 U.S. at 888. One might imagine a constitutional doctrine that took a more restricted view of what behavior could validly be deemed to have religious significance. And for that matter, as David Rabban's historical study has demonstrated, one can imagine a free speech doctrine grounded less in the special protection of recognized modes of expression than in a more general libertarianism. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 23–76 (1997). But while these possibilities should remind us that the distinction I have drawn between religion and speech in legal contemplation is contingent rather than essential, they do not undermine the force of the distinction in the present constitutional imagination.

Entitlement to the benefits of a particular constitutional protection sometimes depends on the existence of specific circumstances, but it rarely depends on the claimant's specific ideological motivation. For example, a landowner does not have to love her land, or even believe in the institution of private property, to claim just compensation if the government takes the land by eminent domain. Nor does a parent have to claim a special attachment to the German language to invoke his substantive due process right to send his children to a school that teaches German.[61] In sum, typical constitutional analysis creates well-defined, but general, zones of liberty.

Religion-based exemptions, however, are once again different. They do not establish general zones of liberty. And they do not recognize general rights. They are, after all, *exemptions.* Under *Sherbet* and RFRA, a "graven image" literalist would have a prima facie right to a driver's license sans photo. But I, a Jew whose religious tradition is more relaxed on this question,[62] would not have such a right, unless I lied and risked being found insincere.

A doctrine of religion-based exemptions bears some resemblance to libertarianism.[63] But it is a differential libertarianism, in which my liberties bear no necessary resemblance to his liberties or her liberties

61. *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923).

62. I rely here on "the dominant position in Jewish law, as well as custom and practice, [which] permits the photographing of human beings." Quaring v. Peterson, 728 F.2d 1121, 1124 n.3 (8th Cir. 1984) (citing Malkiel Zevi Halevi Tennenbaum, 3 RESPONSA DIVREI MALKI'EL § 58 (1897)). The Jewish legal corpus also includes a legitimate, "albeit minority, position [that] prohibits photographs of humans, especially of the face." *Id.*

63. *Cf.* Bowen v. Roy, 476 U.S. 693, 708 n.17 (1986) (plurality opinion) ("It is readily apparent that virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. . . . Accordingly, if the dissent's interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a 'compelling government interest.' While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended.").

Serious libertarians argue that, as a general matter quite apart from the problem of religious exemptions, only a narrow range of laws, limited to certain well-defined ends such as defending persons from violence, are presumptively legitimate. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 25–28 (1974). At the very least, a milder, constitutionally enforced libertarianism might require in a variety of contexts that the government bear the burden of demonstrating that a challenged law has a "proper" purpose and embodies a "close and substantial relationship" between that purpose and the means chosen to pursue it. Ravin v. State, 537 P.2d 494, 498, 504 (Alaska 1975) (striking down a law criminalizing the private use of marijuana). *See generally* Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1 (1998).

or your liberties.[64] In the precise words of *Reynolds* that the *Smith* opinion invokes, religion-based exemptions, if taken seriously, seem to "allow every citizen to become a law *unto himself*."[65]

B. Religious Institutional Autonomy: The Omalous Norm

Whatever one thinks of *Smith*, or of religion-based exemptions,[66] however, the distinct set of doctrines we call religious institutional autonomy are *not* anomalous along precisely the same dimensions that religion-based exemptions *are*. Or, to engage in a bit of etymological back-formation, autonomy is "omalous."[67]

Let me be clear here. Doctrines of religious institutional autonomy do suggest, to one degree or another, a special constitutional status for religion. They even often require that religious institutions be exempt from "neutral, generally applicable laws" that apply to other institutions. Nevertheless, that special status for religious institutions is, in significant ways, distinct from the doctrine of religion-based exemptions that was embraced by *Sherbert* and rejected by *Smith*. The difference is not that institutional autonomy doctrine covers institutions rather than individuals.[68] It is,

64. For a defender of religion-based exemptions, this is a virtue rather than a vice. *See, e.g.*, Dane, *Constitutional Law and Religion*, *supra* note 18, at 119 ("A general 'right of conscience' would radically revise, both jurisprudentially and substantively, the relationship between law and the individual. The free exercise clause, as limited to religious claims, does, to be sure, raise its own problems. But its narrow scope is what makes it more an island in a world of legal obligation than an overarching challenge to the notion of such obligation.").

65. Reynolds v. United States, 98 U.S. 145, 167 (1878) (emphasis added); *see also* Employment Div. v. Smith, 494 U.S. 872, 886 (1990).

66. In the longer paper from which the above was just taken, I go on to suggest how religion-based exemptions, though they are constitutionally anomalous, nevertheless make normative and jurisprudential sense. My strategy involves invocations of legal pluralism, a discussion of the relation of constitutional law to the rest of the legal fabric, and certain fancy abstract claims about the place of stereoscopy and double-coding in legal argument and rhetoric.

67. For the etymology of "anomalous," see *supra* note 31. My back-formation just eliminates the negative prefix.

68. Indeed, it bears emphasis that churches and other religious institutions can themselves seek *Sherbert*-type exemptions, and to that extent, I understand their claims as being outside the scope of my discussion of institutional autonomy. *See, e.g.*, New Life Baptist Church Acad. v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (religious school seeking conscientious exemption from local procedures designed to guarantee adequacy of the secular education that the school provided to its students); S. Ridge Baptist Church v. Indust. Comm'n of Ohio, 676 F. Supp. 799 (S.D. Ohio 1987) (Church sought religion-based exemption from participating in or contributing to Ohio Workers' Compensation scheme).

rather, that the special status provided by the distinct complex of doctrines referred to as religious institutional autonomy is both narrower and broader than that required by the doctrine of religion-based exemptions at issue in *Sherbert* and *Smith*. And those differences render institutional autonomy, with respect to the jurisprudential issues that are at the heart of *Smith*, entirely routine.

Institutional autonomy covers a variety of problems, ranging from classic church property disputes to more recently developing questions over the extent to which various regulatory regimes, including labor law,[69] civil rights law,[70] and even malpractice,[71] defamation,[72] and contract[73] law, should be permitted to intervene in

69. The leading case, though technically decided on statutory rather than constitutional grounds, was *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that the NLRB did not have jurisdiction over a union organizing effort by parochial school teachers). *But cf.* Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985) (upholding the constitutionality of applying a state labor law regime to a religious school); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992) (same).

70. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (enforcing "ministerial exception" to employment discrimination law); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (same); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820 (Mass. 2002) (same).

71. *See, e.g.*, Cherepski v. Walker, 913 S.W.2d 761 (Ark. 1996) (holding that there is no cause of action for clergy malpractice); Nally v. Grace Cmty. Church, 763 P.2d 948, 961 (Cal. 1988) (rejecting a malpractice claim based on suicide allegedly arising out of religious counseling); Schieffer v. Catholic Archdiocese, 508 N.W.2d 907 (Neb. 1993) (same); *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85 (Tex. Ct. App. 1998) (holding that parents could not bring suit for intentional or negligent infliction of emotional distress based on injuries due to a church's effort to drive out demons from their daughter). *But cf.*, Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) (allowing a professional negligence claim by a parishioner against a pastor, but only for "secular" aspects of psychological counseling); Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426 (Minn. 2002) (allowing a negligence claim based on "neutral" legal principles).

72. *See, e.g.*, Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732 (D.N.J. 1999) (refusing to entertain a defamation claim based on communications alleging that the plaintiff was a bigamist according to Jewish law; holding that adjudication of the claim would require courts to inquire into religious doctrine and practice); Goodman v. Temple Shir Ami, Inc., 712 So. 2d 775 (Fla. Dist. Ct. App. 1998); Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995) (recognizing a qualified privilege against a defamation claim for communications made in the context of church disciplinary proceeding). *But see, e.g.*, Kliebenstein v. Iowa Conference of United Methodist Church, 663 N.W.2d 404 (Iowa 2003) (distinguishing *Marks* when alleged defamation was published in a secular newspaper).

73. *Compare, e.g.*, Jewish Center of Sussex County v. Whale, 397 A.2d 712 (N.J. Super. Ct. Ch. Div., 1978) (adjudicating the merits of a suit for rescission of contract between congregation and rabbi, holding that "arrangements between a pastor and his congregation are matters of contract subject to enforcement in the civil court"), *and* Sam v. Church of St. Mark,

the internal relations of religious institutions and communities. But these various categories still produce a discrete, distinct, and objective, even if difficult, set of rights and legal outcomes. Institutional autonomy doctrine, like other constitutional doctrines, provides the standard against which various legal regimes can be found objectively sufficient or defective. It also invites, and requires, exactly the same sort of boundary questions, and answers to those questions, that we find in free speech and other constitutional doctrines. In that important sense, the scope of religious institutional autonomy is narrower than that of a doctrine of religion-based exemptions.

But institutional autonomy is also *broader* than a doctrine of exemptions in a way that takes it out from under *Smith*'s injunction. The right to institutional autonomy does not depend, as the right to religion-based exemptions does, on asserting a specific conflict between a secular legal norm and a sincerely held religious belief. To the contrary, the right to autonomy, correctly understood, attaches to a religious institution regardless of its motives and beliefs.[74] Consider, for example, the so-called ministerial exception, which immunizes decisions about the appointment of clergy from the reach of civil rights and other statutes.[75] The ministerial exception ensures that a church would not have to appoint a woman pastor when doing so is contrary to its theology or doctrine. But it equally protects a church that, though it has no principled objection to

741 N.Y.S.2d 267 (N.Y. App. Div. 2002) (upholding summary judgment for the defendant in a suit for wrongful termination of a priest), *with Goodman*, 712 So. 2d at 777 (dismissing a terminated rabbi's claim for breach of contract, holding that "[i]nquiring into the adequacy of the religious reasoning behind the dismissal of a spiritual leader is not a proper task for a civil court," though allowing a separate claim for payment on past executed contract).

74. Some cases do suggest otherwise. *See, e.g.*, McKelvey v. Pierce, 800 A.2d 840, 851 (N.J. 2002) (allowing suit for tort and breach of contract in which a former seminarian alleged that he had been driven from the seminary by acts of sexual harassment; holding that "[A]lthough the church autonomy doctrine provides a shield against excessive government incursion on internal church management, it . . . is implicated only in those situations where the alleged misconduct is rooted in religious belief" (citations and internal quotation marks omitted)). But they are best explained as instances of sloppy thinking.

75. *See, e.g.*, Werft v. Desert Southwest Annual Conference, 377 F.3d 1099 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); *cf.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004) (applying "ministerial exception" to claim for overtime pay under Fair Labor Standards Act).

women clergy, is simply sexist.[76] In both instances, the decision is outside the scope of secular legal interference.

Admittedly, some parts of religious autonomy doctrine involve attention to particular religious beliefs. The polity inquiry in church property disputes, for example, requires distinguishing between hierarchal and congregational forms of religious governance.[77] But the point of that distinction is to effectuate autonomy for both types of religious institutions, not to suggest that one is entitled to a constitutional privilege to which the other is not.[78]

In sum, an autonomy regime is not an exemptions regime, and *Smith*'s critique of exemptions simply does not touch on the question of autonomy. More specifically, *Smith* is simply not relevant

76. *See, e.g.*, Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999) (affirming dismissal of minister's sex discrimination suit, even though "resolution of the claim" would require "no evaluation or interpretation of religious doctrine"). As the court explained in *Combs*, "in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal." *Id.*; *see also*, Young v. N. Ill. Conference of United Methodist Church, 818 F. Supp. 1206, 1210–11 (N.D. Ill. 1993) (rejecting a minister's suit for race and sex discrimination, even though there were "no religious beliefs specifically at issue" in the case); Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that church was under no obligation to offer a religious justification for its employment decision because the Free Exercise Clause "protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."); *cf* Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) (rejecting a minister's age discrimination suit but remanding for further consideration of a claim of breach of contract).

77. As I will discuss *infra* Part III, *Jones v. Wolf* held that individual states may choose to resolve church property disputes by way of a "neutral principles of law" approach rather than the traditional "polity" approach. Even in such states, however, resort to a polity analysis remains constitutionally mandated under certain circumstances:

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Jones v. Wolf, 443 U.S. 595, 604 (1979).

78. Again, some scattered cases suggest otherwise. *See, e.g.*, Callahan v. First Congregational Church of Haverhill, No. 01-2974H, 2001 Mass. Super. LEXIS 641, at *12 (Dec. 4, 2004) ("While civil courts must tread more cautiously in disciplinary matters concerning hierarchical churches, the same deference is not accorded to congregational churches."), *vacated and remanded by* Callahan v. First Congregational Church of Haverhill, 808 N.E.2d 301 (Mass. 2004). But this approach, again, is clearly mistaken.

to doctrines of religious institutional autonomy that (a) are discrete, defined, and predictable; and (b) apply to religious communities generally.

Of course, none of this in itself constitutes a defense or justification of a vigorous doctrine of institutional autonomy. Such a defense is (mostly) beyond the scope of this Article.[79] Nor does it deny that there is some connection between religious autonomy and religious exemptions. Those of us who defend exemptions on legal pluralist grounds will, in particular, see institutional autonomy—with its juridical and jurisdictional overtones—as emblematic of the larger encounter between religious and secular normative systems.[80] We might even see institutional autonomy as the conceptual kernel around which a defense of exemptions might be built. But that argument does not operate in reverse: while autonomy might be one conceptual starting point for thinking about exemptions, rejecting exemptions, at least on the jurisprudential grounds highlighted in *Smith*, does not threaten the conceptual or doctrinal viability of autonomy.

III. NEUTRAL PRINCIPLES AND THE AMBIGUITIES OF SELF-GOVERNANCE

Religious institutional autonomy faces another purported challenge, however, in *Jones v. Wolf* [81] and its invocation of "neutral principles of law." My argument in this Part of the Article is that, contrary to some lower court decisions, *Jones*'s language of "neutral principles of law" is not the equivalent of *Smith*'s "neutral, generally applicable laws." Furthermore, *Jones*, though a problematic case in many respects, firmly stands not for an attack on religious institutional autonomy, but for the recognition that, in a complex world, there might be more than one way for a secular legal system to try to respect that autonomy.

A. The Case (Read and Misread)

Jones v. Wolf, handed down about eleven years before *Smith*, was—unlike *Smith*—squarely about the scope and character of

79. I will have something to say on this question in Part V of this Article, but part of what I will say is that only so much can be said.

80. *Cf.* Part V *infra* (discussing the "existential encounter" of religion and the state).

81. 443 U.S. 595 (1979).

religious institutional autonomy. And the Court did hold in *Jones* that, in resolving church property disputes, state tribunals were not under all circumstances required to defer to the decisions of authoritative church tribunals, but that they could instead employ the so-called neutral principles of law approach, looking to the secular meaning of instruments such as deeds, trusts, articles of incorporation, and the like.[82] Thus, read a certain way, *Jones* would seem to strip away the affirmative force of the principle of religious institutional autonomy[83] and reduce autonomy to a merely negative injunction that civil courts may not entangle themselves in the interpretation and application of substantive religious doctrine.[84]

82. *Id*. at 602.

83. For discussions of the distinction between the affirmative and negative aspects of religious institutional autonomy, see Dane, *The Varieties of Religious Autonomy*, supra note 18, at 117; *see also* Perry Dane, *The Corporation Sole and the Encounter of Law and Church*, *in* SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS 50 (Nicholas Jay Demerath III et al. eds., 1998) [hereinafter Dane, *The Corporation Sole and the Encounter of Law and Church*].

84. *See, e.g.*, Singh v. Singh, 114 Cal. App. 4th 1264 (2004) (affirming lower court judgment ordering membership of Sikh temple to hold an election for its board of directors); Weaver v. Wood, 2 Mass. L. Rep. 522 (Mass. 1994) (allowing suit by church members against church officials complaining about certain expenditures on media ventures, at least as to those counts in complaint that would not contain references to religious doctrine, polity, and practice); Fortin v. Roman Catholic Bishop of Worcester, 625 N.E.2d 1352 (Mass. 1994) (finding jurisdiction in suit by parishioners complaining that Catholic bishop had improperly closed their church, yet holding for bishop on the merits); *see also* Frederick Mark Gedicks, *Toward a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 943 (2000) ("When read with *Smith*, the neutral principles exception of *Jones* seriously undercuts the protection from government intrusion that the church autonomy cases once afforded to religious groups. After all, when neutral legal principles suggest how a denominational dispute should be decided, the independence and autonomy of the church is irrelevant, and a court may proceed to resolve the dispute in accordance with such principles even if the resolution ignores or contradicts the result indicated by the church's own governing structure."); Scott C. Idelman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 252–55 (2000).

Some of the language in *Jones v. Wolf could* fairly be read to support this minimalist interpretation of the demands of religious institutional autonomy. *See* 443 U.S. at 602 ("The First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, 'a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' At least in general outline, we think the 'neutral principles of law' approach is consistent with the foregoing constitutional principles." (internal citations omitted)). As I will demonstrate, however, the Court's actual defense of the

And, indeed, some courts have applied the "neutral principles of law" mantra in a range of situations to erode the organizational self-governance and self-policing of religious communities. This is most apparent in some of the context of sexual abuse and related claims,[85] which I discuss in more detail in Part IV of this Article. But other instances appear in scattered state court decisions that have, for example, allowed parochial school teachers to unionize under state labor law,[86] overridden a synagogue's decision regarding the prerequisites for membership,[87] and reached the merits of a suit by Catholic parishioners against a bishop's decision to close their church.[88] In that sense, *Jones*'s willingness to allow churches to be subject to neutral principles of law might seem to foreshadow *Smith*'s willingness to allow all religious folk to be subject to neutral, generally, applicable laws.[89]

neutral principles approach was not merely that it was minimally "consistent" with the prohibition on civil courts resolving issues of religious doctrine. Just as important, the Court emphasized that the "neutral principles" approach could potentially allow churches to express their affirmative will through secular instruments of private ordering, and also pointed out how the difficulties in the polity approach as an instrument for deference to the autonomous decisions of churches.

85. *See, e.g.*, Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d 139 (D. Conn. 2003); G.B. v. Archdiocese of Portland, No. 01-1437-AS, 2002 U.S. Dist. LEXIS 7033 (D. Or. Feb. 11, 2002); Smith v. O'Connell, 986 F. Supp. 73, 77–80 (D.R.I. 1997); Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993) ("Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution. . . . Because the facts of this case do not require interpreting or weighing church doctrine and neutral principles of law can be applied, the First Amendment is not a defense against [the plaintiff's] claims."); J.M. v. Minn. Dist. Council of the Assemblies of God, 658 N.W.2d 589 (Minn. 2003) (allowing suit for negligent retention against a church because the "Establishment Clause is not implicated [in tort suits against churches] where neutral principles of law, developed and applied without particular regard to religious doctrines, establish the applicable standard of care").

86. *See* South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 723 (N.J. 1997) (despite concerns that resort to neutral principles of law "ignores the church's resulting loss of autonomy and avoids the required in-depth constitutional analysis[,] . . . we conclude that reliance on the doctrine of neutral principles will prove proper and efficacious").

87. *See* Park Slope Jewish Ctr. v. Congregation B'nai Jacob, 686 N.E.2d 1330 (N.Y. 1997) (remanding to enforce terms of prior stipulation between groups using the same synagogue building).

88. Fortin v. Roman Catholic Bishop of Worcester, 625 N.E.2d 1352 (1994).

89. *See* Roberts, *supra* note 10, at 218 n.39 (asserting that "neutral principles" cases "undermined *Watson* by suggesting that the state's adjudicators are not bound by the findings of religious lawfinders, and foreshadowed *Smith* by forcing the state's terms upon religious law"). Consider also Professor Idelman's argument:

> [T]he Supreme Court in recent years has consistently recalibrated its jurisprudential conception of "neutrality" essentially to mean equality-of-treatment between

B. The Complexity of Autonomy

This sort of reading of *Jones*, as intimately tied to *Smith*, should be met skeptically if for no other reason than the radically different judicial line-ups in the two cases. The 5–4 decision in *Jones* was mostly a product of the so-called liberal wing of the Court,[90] while the dissent was made up of more conservative justices.[91] Those sides were reversed, of course, in *Smith*: three of the five justices who joined the *Jones* majority dissented in *Smith*,[92] and Justice White, the only dissenting justice in *Jones* still on the Court when *Smith* was decided, joined that decision's majority.[93] Clearly, the ideological

> religion and nonreligion. Thus, according to this revised view, the Free Exercise Clause should generally not be read to require accommodation for religious practices where such accommodation would not be required or is not provided for nonreligious practices, while the Establishment Clause should generally not be read to prohibit support to religion (at a widely diffused level) where such support is also provided to nonreligion. . . . Superficially, at least, the "neutral" approach would now entail subjecting such defendants and their conduct to the same adjudicatory processes as their nonreligious counterparts, a prospect that has already been partly realized by the Court's embrace of the "neutral principles of law" approach to resolving church property cases and, in turn, by the lower court utilization of that approach to resolve tort suits against religious defendants.

Scott C. Idelman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 252 (2000); s*ee also* Farrell, *supra* note 8, at 126–27 (2003) ("In short, the neutral-principles analysis articulated in *Jones* appears to have expanded so that it permeates much of the Court's religion-clause jurisprudence."); *see also, e.g.*, *O'Connell*, 986 F. Supp. at 79 (explaining *Smith*'s "well-established principle that neutral laws of general application do not violate the First Amendment simply because they have the incidental effect of burdening a particular religious practice" by reference to language defending the "neutral principles of law" approach in *Jones*). For cases that simply mash together the "neutral principles of law" idea in the church autonomy cases with the "neutral, generally applicable laws" idea in *Smith*, see, for example, Sanders v. Baucum, 929 F. Supp. 1028, 1034 (N.D. Tex. 1996); Rashedi v. Gen. Bd. of Church of the Nazarene, 54 P.3d 349 (Ariz. Ct. App. 2002); *Moses*, 863 P.2d 310; Malicki v. Doe, 814 So. 2d 347 (Fla. 2002).

90. Justice Blackmun wrote the opinion for the Court, which was joined by Justices Brennan, Marshall, Rehnquist, and Stevens. *See Jones*, 443 U.S. at 595. For an effort to link Justice Blackmun's opinion to "larger themes in Justice Blackmun's civil liberties jurisprudence," see Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 21–28 (1998).

91. Justice Powell wrote the dissenting opinion, joined by Chief Justice Burger and Justices Stewart and White. *Jones*, 443 U.S. at 610.

92. Justice Blackmun dissented, joined by Justices Brennan and Marshall. *Smith*, 494 U.S. at 907.

93. *Id*. at 872.

wings of the Court thought that the stakes in the two cases were very different.[94]

The real problem with reading *Jones* as a precursor to *Smith*, however, is conceptual rather than biographical. Just as the emphasis on neutral, generally applicable laws in *Smith* must be read in the context of the specific jurisprudential challenges posed by religion-based exemptions, the emphasis on neutral principles of law must be read in the context of certain theoretical and practical challenges in the understanding of religious institutional autonomy. Other than an unfortunate coincidence of language, the two ideas have little to do with each other and they therefore cannot simply be strung together to suggest an erosion of religious institutional autonomy.

To understand the real import of *Jones*'s approval of neutral principles of law as one method for resolving certain intrachurch disputes, it will do well to consider that, as I have argued elsewhere, "religious autonomy . . . is a necessarily complicated and contested idea, much like other great values such as democracy or freedom."[95] It is not only complex by virtue of the range of situations in which it arises, but more fundamentally, it is complex because there are many different, sometimes contradictory, ways one might understand and

94. *See* Rahdert, *A Jurisprudence of Hope*, supra note 90, at 28 (discussing Justice Blackmun's opinion for the Court in *Jones* in the context of his dissent in *Smith*).

Justices Rehnquist and Stevens joined the majority in both *Jones* and *Smith*. *Jones*, 443 U.S. at 596; *Smith*, 494 U.S. at 873. Justice Stevens, at least, might well have read the two cases as supporting a common conception of neutrality, which is that religion can, and perhaps must, be accorded no special deference. This would be consistent with the distinctive, arguably unique, position that Justice Stevens has staked out on the meaning of both religion clauses and their relationship with each other. *Cf.* Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1403–04 (2003) (noting that Justice Stevens comes closest, in both his Free Exercise and Establishment Clause jurisprudence, to taking the view that both the Free Exercise and Establishment Clauses should be interpreted in light of the distinct danger that religious communities pose of becoming "sovereign rivals to the state"); Lupu & Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, *supra* note 21, at 48–49 & n.48 (describing a "Secularist" position that is "attuned to the dark side of religion" and arguing that "Justice Stevens is relentlessly secularist. He routinely joins opinions that are receptive to Establishment Clause claims [and] . . . also routinely joins opinions that are hostile to Free Exercise Clause claims."). It is no coincidence, after all, that Stevens was the only justice who, in *City of Boerne*, took the view that the Religious Freedom Restoration Act violated, not only separation of powers and federalism, but the Establishment Clause as well. City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Steven, J., concurring).

95. Dane, *The Varieties of Religious Autonomy*, *supra* note 18, at 117; *see also* Dane, *The Corporation Sole and the Encounter of Law and Church*, *supra* note 83, at 50.

effectuate the goal of autonomy.[96] One way to respect a juridical community's autonomy, for example, is to give effect to that community's substantive norms. From that perspective, the much-maligned "departure from doctrine" approach, whose rejection is at the heart of American thinking on intrachurch conflicts, actually looks very good.[97] Another way to respect a community's autonomy, however, is to respect the community's own processes of decision making. That goal would commend the so-called polity approach represented by *Watson v. Jones* and its progeny.[98] Nevertheless, while the polity approach respects one sense of such decisional autonomy by deferring to the appropriate decisionmaking body of a religious community, it risks compromising a related sense of decisional autonomy by requiring a court to identify, sometimes in the face of severe conflict, where that locus of authority resides.[99]

96. In *The Varieties of Religious Autonomy*, *supra* note 18, I identify the following general, sometimes overlapping and sometimes contradictory, categories of autonomy: Adjudicative Abstention, Substantive Interpretive Abstention, Jurisdictional Interpretive Abstention, Procedural Interpretive Abstention, Recognition, Substantive Deference, Decisional Deference, Constitutive Deference, and Dynamic Deference. I also discuss the possibilities of what I call Integrative Rejection, Non-Integrative Acceptance, and Integrative Acceptance as approaches—each in some way recognizing a form of autonomy—to the encounter of the secular and religious normative spheres.

97. *See* Denise G. Réaume, *Common Law Constructions of Group Autonomy: A Case Study*, 39 NOMOS 257 (1997). In *Varieties of Religious Autonomy*, *supra* note 18, I argued that the constitutionally mandated refusal of American courts to interpret the substantive doctrine of religious communities for themselves should be understood to arise "not only out of a commitment to religious autonomy—particularly when such abstention rules out effectuating competing forms of autonomy—but more particularly reflects other, undoubtedly important, values in the American principle of nonestablishment." *Id.* at 146.

98. *See, e.g.*, Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 110–16 (1952); Watson v. Jones, 80 U.S. 679 (1871).

99. *See* Jones v. Wolf, 443 U.S. 595, 605 (1979) ("[Under the 'polity' approach to church property disputes,] civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and '[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association.' In such cases, the suggested rule would appear to require 'a searching and therefore impermissible inquiry into church polity.'" (citations omitted)); Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 123 (1998) ("[I]n an effort to avoid making an independent inquiry into a church's polity, courts often have no other means of ascertaining the locus of authority except to rely upon the 'self-serving declarations of the national church.' However, this reliance on the higher church's self-characterization, deprives the local church of any genuine opportunity to prove that the church is, in fact, not hierarchical." (footnotes omitted)).

On another axis of contested meaning, autonomy doctrine must necessarily be torn between, on the one hand, respecting a religious community's right to bind itself through fixed, constitutive norms and, on the other hand, respecting that same community's right to undergo revolutionary change. Or consider the tension between respecting the right of a religious community to exercise its authority over dissenters, which is central to any juridical enterprise, and the right of dissenters to separate themselves, which is equally central to the dynamics of religious history.

My own view, as I have argued elsewhere, is that some of these tensions are simply intractable.[100] Sometimes only one form of autonomy will genuinely be at stake. But not always. And in that event, no solution is ideal, even from the point of view of a fervent friend of religious autonomy.

The neutral principles of law approach legitimated in *Jones v. Wolf* is best understood as one effort, for better or worse, at cutting through that intractability. It allows churches to resolve the meaning of autonomy for themselves through the instruments of secular private ordering. As the Court stated,

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. . . . Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. . . . In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.[101]

Whether this solution, even as an option left open to individual states, makes sense as an expression of institutional autonomy doctrine is a good question.[102] The answer is likely deeply contextual,

100. *See* Dane, *The Corporation Sole and the Encounter of Law and Church*, *supra* note 83, at 50.

101. *Jones*, 443 U.S. at 603–04. One commentator, in trying to locate the *Jones* opinion in the wider context of Justice Blackmun's jurisprudence, has argued specifically "that what gives the 'neutral principles' approach its constitutional 'advantage,' is that the . . . Court preserves the freedom of religious groups and individuals to . . . structure for themselves the fundamental character of their property relationship." Rahdert, *supra* note 90, at 28.

102. For criticisms of the neutral principles approach from the point of view of defenders of religious institutional autonomy, see Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291,

having to do with whether private ordering through instruments such as deeds and trusts can in particular instances effectively translate religious principles into enforceable secular norms.[103] It also depends on whether enforcing religious disputes through even privately-ordered secular rules compromises what might be called the dignitary autonomy that comes when the secular state recognizes the norms of religious self-governance more directly. But these issues are beyond the scope of this Article. What should be clear is that the neutral principles approach *only* makes sense, if it ever does, in the context of an effort to effectuate a religious community's effort to specify the form that the community's autonomy should take through some type of private ordering.[104] Indeed, seen in this light,

1294–97 (1980); Belzer, *supra* note 99, at 123; Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1071 (1989); John E. Fennelly, *Who is the Church?*, 9 ST. THOMAS L. REV. 319, 334 (1997) (arguing that the "imposition of secular philosophical and political concepts" such as majority rule "lurked below the seemingly benign notion of neutral principles"); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 863–68 (1984) (arguing that the neutral principles approach, in requiring recourse to secular documents but disallowing judicial interpretation of religious language, imposes a unique disability on religious institutional autonomy). *But cf.*, Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 516 (1990) (arguing that only the "neutral principles" approach can maintain equality among religious factions, and that without such "equality of treatment, courts risk establishing one religious faction at the expense of the free exercise rights of the other religious faction").

103. *See* Dane, *The Varieties of Religious Autonomy*, *supra* note 18, at 117 ("I do not want to suggest here that something like the neutral principles approach is always an unsatisfactory response to intracongregational disputes. But for the approach to have any hope of advancing religious autonomy, in any of its multiple meanings, the formal instruments on which the approach depends must be understood, not as simple secular documents, but as imperfect and provisional efforts to facilitate and organize the encounter between the religious nomos and the secular state . . . ."); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 106 n.33 (noting that "[i]n discussing how constitutional law relates to religious groups, some commentators seem not to have considered the possibility that groups are formed and maintained on noncontractual bases"); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Instiutions*, 55 FORDHAM L. REV. 335, 357 (1986) ("[The neutral principles test] is based on a hybrid organizational model . . . [that] assumes that the church has translated into familiar secular terminology its organizational characteristics, no matter how secular or alien they may be. The hybrid model fails to comport with reality, however, because it assumes that selectively culled provisions accurately reflect the expectations of the parties. It thus permits dispute resolution only by positing an artificial formalism on the church's part.").

104. As Rahdert has pointed out, Justice Blackmun, in his opinion for the Court in *Jones v. Wolf*,

> qualified his approval for the neutral principles approach by considering only its "broad outline[s]," and by stressing the "minimal burden" on religion that the approach, in the Court's judgment, entailed. After *Jones*, it is still possible that some

the neutral principles approach emerges, not as the polar opposite of the polity approach, but as one of a complicated range of possible strategies, which also includes, for example, the special statutory schemes favored in some states[105] for trying to mediate between the normative lexicons of church and state.[106] To treat the neutral principles idea, as some courts have,[107] as a sort of mini-*Smith* doctrine—to confuse neutral principles of law with *Smith*'s invocation of neutral, generally applicable law and, therefore, to employ it to reject claims of autonomy in the face of any secular and neutral regulatory regime—is just flat wrong.

C. The Logic of "Neutrality"

Indeed, to imagine otherwise would invite implications well beyond those probably contemplated by the courts and commentators that have invoked neutral principles so far. Consider,

> specific "neutral" principle might, as applied in a specific factual context, work a more substantial burden on religion that would provoke a more searching inquiry. In other words, under Jones's reasoning neutrality is a necessary, but not by itself a sufficient, condition for constitutionality; the degree of burden on religious belief is also an important factor. This aspect of *Jones* comes into sharper focus when one considers Justice Blackmun's dissent in *Employment Division of Oregon v. Smith*, where he rejected the Court's view that neutral and generally applicable government regulations should be largely insulated from searching free exercise review.

Rahdert, *supra* note 90, at 28 (footnotes omitted).

105. Some states, for example, have enacted lengthy religious corporation codes that detail, one by one, the governance structures of a variety of specific religious faiths. *See, e.g.*, N.J. STAT. §§ 16:2-1 to 16:19-9; N.Y. RELIGIOUS CORPORATIONS LAW §§ 40–455. *See generally* Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 BYU L. REV. 439, 452 (listing and discussing statutory provisions); Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1533–38 (1973) (same). Other states make do with more focused statutory provisions that try, through such devices as the "corporation sole," to allow hierarchal religious groups to give secular form to their distinctive theology of ecclesiastical governance. *See, e.g.*, ARIZ. REV. STAT. §§ 10-11901 to 10-11908; CAL. CORP. CODE §§ 10000–15; Montana Religious Corporation Sole Act, MONTANA CODE §§ 35-3-10-1 to 35-3-210. *See generally* Dane, *The Corporation Sole and the Encounter of Law and Church*, *supra* note 83; Gerstenblith, *supra*, at 454–61; James B. O'Hara, *The Modern Corporation Sole*, 93 DICK. L. REV. 23 (1988). These are, of course, only two of several templates for the statutory treatment of religious organizations. As discussed in note 108 *infra*, some state codes try, at least in some ways, to subsume religious corporations into their general law of nonprofit corporations.

106. *See generally* Dane, *The Corporation Sole and the Encounter of Law and Church*, *supra* note 83, at 50.

107. *See, e.g.*, Sanders v. Baucum, 929 F. Supp. 1028, 1034 (N.D. Tex. 1996); Rashedi v. Gen. Bd. of Church of the Nazarene, 54 P.3d 349, 352–55 (Ariz. Ct. App. 2002); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Ordenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 435–36 (Minn. 2002).

for example, the general rule that every nonprofit corporation be led by a board of directors of not less than three persons.[108] In some states, as noted earlier, special statutory provisions cover the organizational structure of some or all religious entities.[109] But in states in which the general three-director rule would apply, at least on its face, to churches along with other nonprofit entities,[110] could such a requirement be enforced against, say, the Catholic Church? The realistic answer is probably no.[111] But, to the extent that the neutral principles of law doctrine in *Jones* is read to allow states to defeat, and not merely facilitate, religious institutional autonomy, it would be hard to see exactly why.

108. For example, the Revised Model Nonprofit Corporation Act provides that any nonprofit corporation "must have a board of directors," MODEL NONPROFIT CORPORATION ACT § 8.01(a), and that "[a] board of directors must consist of three or more individuals, with the number specified in or fixed in accordance with the articles or bylaws," *id.* § 8.03(a). This language appears, for example, in ARK. CODE § 4-33-803 (2004); FLA. STAT. § 617.0803 (2004); MINN. STAT. § 317A.203 (2004); VT. STAT. ANN. § 8.03 (2004). For similar requirements, see ALA. CODE § 10-3A-35 (2004).

109. *See supra* note 108 (discussing states with separate religious corporation codes, or with special statutory provisions providing for "corporations sole" or other forms of organization tailored to the needs of particular religious traditions.)

110. The Revised Model Nonprofit Corporation Act, for example, unlike its predecessor, treats religious corporations as a category of nonprofit entity distinct from public benefit or mutual benefit corporations, and although it exempts religious corporations from certain requirements applicable to the others, it does not directly excuse churches from the rule in section 8.03(a), which specifies the minimum number of directors at three. To be sure, the Model Act provides in a general way that "[i]f religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this act on the same subject, the religious doctrine shall control to the extent required by the constitution of the United States or the constitution of this state or both." *Id.* § 1.80. But this provision is of no use unless the Constitution would indeed immunize a church from the reach of section 8.03 and other neutral rules of governance and administration. *See generally* Catherine M. Knight, Comment, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L.J. 721 (1993) (arguing that the revised Model Act, though it is an improvement on earlier versions, still leaves churches with too little flexibility regarding their forms of governance). Perhaps for that reason, at least one state that adopted the text and approach of the Model Act has nevertheless added more generous disclaiming language to this provision. *See, e.g.*, IDAHO CODE § 30-3-65 ("Notwithstanding the foregoing, the board of directors of a religious corporation must consist of at least one (1) individual, with the number specified in or fixed in accordance with the articles or bylaws.").

111. *Cf.* Crocker v. Stevens, 435 S.E.2d 690, 695 (Ga. App. 1993) (holding that GA. CODE ANN. § 14-5-43, which provides that the "majority of those who adhere to its organization and doctrines represent a church," "properly is to be construed as being applicable only to churches having a congregational form of government" (quoting Jones v. Wolf, 260 S.E.2d 84, 85 (Ga. 1979) (on remand from United States Supreme Court))).

This problem is put in further relief if we consider that my hypothetical puzzle is not as far-fetched as it sounds. In the nineteenth century, the organizational form of many Catholic parishes included lay trustees who sometimes acted in opposition to the will of their diocesan bishops.[112] This pattern of trustee governance reflected, in part, a larger movement among United States Catholics known as "Americanism."[113] It only receded due to a combination of theological assertiveness by Rome and certain American bishops and the creation of statutory or common law

112. Some analysts tie this phenomenon to the secular legal system's anti-Catholic bias. Liam Seamus O'Melinn, for example, has argued that

> The Catholic experience of incorporation points to one of the peculiarities of American law in the first half of the nineteenth century: in many states Catholic Churches were allowed to incorporate, but only according to Protestant rules.
>
> The law was tolerant and intolerant at the same time. . . . [In some states,] Catholic churches could incorporate but were subject to the trustee requirement. This requirement, which vested control of the church's government in a group of laymen rather than in a member of the church hierarchy, was obviously antithetical to the governmental structure of the Catholic Church.
>
> This discrimination was intentional, and it led to a longstanding conflict. Courts in Virginia, New York, Pennsylvania, and Massachusetts all expressed, at one time or another, hostility toward Catholicism. The result of this hostility was a lengthy battle between the church hierarchy and the state legislatures. On many occasions, there were also battles between trustees and their bishops.

Liam Seamus O'Melinn, *The Sanctity of Association: The Corporation and Individualism in American Law*, 37 SAN DIEGO L. REV. 101, 139–40 (2000) (citations omitted).

In fact, the story is more complicated, in that the so-called trustee system was as much the product of an internal dynamic among American Catholics as of external prejudice. Under the trustee system,

> The clergy worked for the board and were subject to the trustees' wishes. The trustees hired them, and they could also fire them. . . . One of the most popular slogans of the day was "the voice of the people is the voice of God." Catholic trustees appropriated this maxim and applied it to the church.

JAY DOLAN, IN SEARCH OF AN AMERICAN CATHOLICISM, A HISTORY OF RELIGION AND CULTURE IN TENSION 31–33 (2002) [hereinafter DOLAN, IN SEARCH OF AN AMERICAN CATHOLICISM]. *See generally* PATRICK W. CAREY, PEOPLE, PRIESTS, AND PRELATES: ECCLESIASTICAL DEMOCRACY AND THE TENSIONS OF TRUSTEEISM (1987); JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT (1985); THOMAS T. MCAVOY, A HISTORY OF THE CATHOLIC CHURCH IN THE UNITED STATES (1969). *See also* Dane, *The Corporation Sole and the Encounter of Law and Church*, *supra* note 83, at 50.

113. *See generally* PATRICK W. CAREY, AMERICAN CATHOLIC RELIGIOUS THOUGHT (1987); CAREY, *supra* note 112; David O'Brien, *Americanism*, *in* THE ENCYCLOPEDIA OF AMERICAN CATHOLIC HISTORY 97 (Michael Glazier & Thomas Shelley eds. 1997); Thomas Wangler, *Americanist Beliefs and Papal Orthodoxy: 1884–1899*, *in* 11 U. S. CATHOLIC HISTORIAN 37 (1993). *See also* DOLAN, SEARCH OF AN AMERICAN CATHOLICISM, *supra* note 112.

vehicles through which the church could manifest a more hierarchal, single-leader vision of diocesan authority. This nineteenth century intra-Catholic debate over church governance, however, continues to resonate[114] in contemporary struggles concerning whether American Catholicism needs to take on a more democratic and distinctively American form.[115] It is even possible to imagine a serious argument that the secular law, by enshrining and enforcing the authority of bishops in Catholic governance, is intrusively weighing in on one side of an internal Catholic debate about theology and ecclesiology and stifling what might otherwise be organic developments toward new notions of governance and authority. To that extent, at least, the question of whether to apply something like a three-member board requirement might begin to look like one of those intractable problems discussed above.[116] But it is one thing to say that a problem is difficult, or that the meaning of autonomy might be complicated and contested, or that different aspects of autonomy might be in unresolvable tension with each other. But it is quite another thing to say that the state could or should impose its own neutral rules and values without regard to any genuine conception of religious autonomy at all.

114. *See, e.g.*, Pete Hamill, *Past Offers Cure for Church Ills*, N.Y. DAILY NEWS, May 13, 2002 ("The people in the Sunday morning pews support the local church with their contributions, but because the financial workings of the church are secret—here and in the Vatican—they get no accounting of the funds. . . . Much of that could be changed by going back to the future. . . . The quickest way to reestablish minimal trust might be to revive the notion of boards of trustees. . . . The trustees, in short, would have the last say on nonspiritual matters, from bank loans to legal expenses. They would be responsible for hiring and firing priests, and researching their histories. They would be the point of the spear aimed at corrupt priests. . . . Eventually, they could even demand from Rome the right to veto the Vatican's choices of bishops."); Raymond Schroth, *19th-Century Lessons in Lay Governance*, NAT'L CATHOLIC REP., Nov. 1, 2002 ("If lay trustees had owned the churches and controlled the finances of the parishes in Boston, Los Angeles, New York and Milwaukee, would an offending priest have been shifted under a cloud of secrecy from one set of victims to another? Would hush money have been slipped to a blackmailer?").

115. For recent efforts to articulate a more democratic and lay-centered vision of American Catholicism, see DAVID GIBSON, THE COMING CATHOLIC CHURCH: HOW THE FAITHFUL ARE SHAPING A NEW AMERICAN CATHOLICISM (2003); PAUL LAKELAND, THE LIBERATION OF THE LAITY: IN SEARCH OF AN ACCOUNTABLE CHURCH (2003); PETER STEINFELS, A PEOPLE ADRIFT: THE CRISIS OF THE ROMAN CATHOLIC CHURCH IN AMERICA (2003).

116. For a similar argument, see Dane, *The Corporation Sole and the Encounter of Law and Church*, *supra* note 83, at 50.

IV. THE BOUNDARIES OF AUTONOMY AND THE CHALLENGE OF NEUTRALITY

I have argued that neither *Smith* nor *Jones* stands for a larger, unqualified principle of neutrality under which the secular law can treat the religious realm just as it treats any other domain. Nevertheless, the fact remains that *Smith* did radically cut back on the protections afforded by the Free Exercise Clause.[117] So the question remains where to draw the boundary between a truncated, crabbed right of free exercise and a vigorous, deferential, rich principle of religious institutional autonomy.

The answer, I suspect, will again be deeply contextual. The considerations present in the church property context might well be different, for example, from those present in the ministerial exception context. Without trying to canvass the entire landscape, however, I do want to touch briefly on one specific problem: church liability for sexual crimes committed, particularly against children, by clergy. In this context, and those like it, the arguments for secular legal intervention—over and above enforcing private ordering—and the imperative of institutional self-definition seem most acute.

A. The Dilemma Defined

A free exercise analysis of a state's response to the primary act of sexual abuse by a member of the clergy is in itself quite straightforward. Even a supporter of a broad regime of religion-based exemptions would be reluctant to extend immunity from ordinary criminal or tort liability to a perpetrator of unambiguous[118] sexual abuse against children.[119] To begin with, no proper claim for a

117. I leave for another occasion any consideration of the openings left in *Smith* for exemption claims in "hybrid cases" and in contexts involving "individualized government assessment of the reasons for the relevant conduct." Employment Div. v. Smith, 494 U.S. 872, 882, 884 (1990).

118. Arguably more complicated issues arise when more ambiguous forms of "touching," allegedly in the service of pastoral or counseling relationships, are alleged to have crossed the line of legality. *See, e.g.*, Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996).

119. *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999). Similarly, more complicated questions arise in the context of ostensibly consensual sexual relationships between clergy and adults. *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Doe v. Evans, 814 So. 2d 370 (Fla. 2002); Amato v. Greenquist, 679 N.E.2d 446 (Ill. Ct. App. 1997); F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997); Langford v. Roman Catholic Diocese, 271 A.D.2d 494 (N.Y. Sup. Ct. 2000); Hawkins v. Trinity Baptist Church, 30 S.W.3d 446, 453 (Tex. Ct. App. 2000); *cf.* Janice D. Villiers,

Sherbert-type exemption could even arise unless the sexual abuse were carried out in fulfillment of a putative religious norm, and, at least for clergy from mainstream churches, that argument tends not to arise.[120] Moreover, if a specific religious defense were raised, even the staunchest defenders of free exercise would still probably reject it, either by applying the compelling-state-interest test[121] or through some more categorical test,[122] or just on the same sort of notion of

Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship, 74 DENV. U. L. REV. 1 (1996).

120. *See, e.g.*, Jones v. Trane, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992) ("It may also be noted in passing that, although defendants persistently assert First Amendment protection, none makes any suggestion that the alleged sexual misconduct of defendant Trane [in sexually molesting a minor] is a part of the tenets or practices of the Roman Catholic Church . . . ."); *cf.* F.G. v. MacDonell, 696 A.2d 697, 702 (N.J. 1997) (various church officials testified that Episcopal Church teachings did not sanction sexual relationship between a married rector and an unmarried parishioner); Smith v. Privette, 495 S.E.2d 395, 398 (N.C. App. 1998).

Indeed, the profound contradiction between the sexual misconduct of a member of the clergy and the professed tenets of his church has routinely been the basis for dismissing simple vicarious liability claims against those churches, thus requiring plaintiffs to pursue causes of action for negligent hiring, negligent supervision, and the like. *See, e.g.*, Tichenor v. Roman Catholic Archdiocese of New Orleans, 32 F.3d 953 (5th Cir. 1994); Taylor v. Beth Eden Baptist Church, 294 F. Supp. 2d 1074 (N.D. Cal. 2003); Wilson v. Diocese of N.Y. of the Episcopal Church, No. 96 Civ. 2400, 1998 U.S. Dist. LEXIS 2051 (S.D.N.Y. Feb. 23, 1998); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 71 (D. Conn. 1995); Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1179 (N.D. Tex. 1995); Juarez v. Boy Scouts of Am., Inc., 95 Cal. Rptr. 2d 786 (Cal. Ct. App. 2000); Jeffrey E. v. Central Baptist Church, 243 Cal. Rptr. 128 (Cal. Ct. App. 1988); Sparano v. Daughters of Wisdom, No. X08CV030199399, 2004 Conn. Super. LEXIS 1808 (July 1, 2004); Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532 (Ga. Ct. App. 1996); Konkle v. Henson, 672 N.E.2d 450 (Ct. App. Ind. 1996); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995); N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 599 & n.30 (Okla. 1999). *But see, e.g.*, Doe v. Norwich Roman Catholic Church, 309 F. Supp. 2d 247 (D. Conn. 2004) (refusing to dismiss a vicarious liability count when abuse took place in the context of counseling); Enderle v. Trautman, No. A3-01-22, 2001 U.S. Dist. LEXIS 20181 (D.N.D. Dec. 3, 2001) (refusing to grant summary judgment on vicarious liability issue); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348 (Alaska 1990).

121. The classic cases, specifically approved in *Sherbert*, 374 U.S. at 403, concerning the state's compelling interest in protecting children from physical harm are *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding the application of a child labor statute), and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination). *Cf.* New York v. Ferber, 458 U.S. 747 (1982) (upholding a state's compelling interest in protecting children as against free speech claim).

122. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1144–45 (1990) (arguing that when a "putative injury is internal to the religious community, the government generally [should have] no power to intervene, with the narrow exception of injury to children"); *cf.* Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1989) (suggesting a third-party injury test in free exercise cases).

humanitarian intervention that sometimes counsels even political sovereigns to interfere in each other's affairs.[123]

It is also possible to imagine an entire company of clergy that is one large criminal conspiracy to engage in or abet the sexual abuse of children.[124] In that eventuality, what is true of the state's authority to deal with an individual perpetrator should also be true for its authority to deal with the group.[125]

Most lawsuits against churches arising out of clergy sexual abuse are not so straightforward, however.[126] Rather than alleging direct

123. *See generally* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J. L. Holzgrefe & Robert O. Keohane eds., 2003); HUMANITARIAN INTERVENTION: MORAL AND PHILOSOPHICAL ISSUES (Aleksandar Jokic ed., 2003); FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 177–78 (2d ed. 1997); NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY (2000). The force of this analogy is that it emphasizes that even when intrusion into the religious *nomos* is justified it remains problematic and comes at a cost to important principles of sovereign self-determination.

124. Definitions of conspiracy vary. But both criminal and civil conspiracy generally requires something like an agreement by two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. *See, e.g.*, Iannelli v. United States, 420 U.S. 770, 777 (1975); Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 414 (3d Cir. 2003); State v. Ball, 661 A.2d 251, 269 (N.J. 1995); MODEL PENAL CODE § 5.03(1) (1962); RESTATEMENT (SECOND) OF TORTS § 876(a). Similarly, criminal or civil "aiding and abetting" liability requires, at least, both knowledge of the underlying offense and substantial assistance in the commission of that violation. *See, e.g.*, United States v. Woods, 148 F.3d 843, 847 (7th Cir. 1998); SEC v. Fehn, 97 F.3d 1276, 1288 (9th Cir. 1996); People v. Castenada, 3 P.3d 278, 282 (Cal. 2000); Heick v. Bacon, 561 N.W.2d 45, 51–52 (Iowa 1997); MODEL PENAL CODE § 2.06(3)(a)(ii); RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

As relevant to suits against churches or church officials for sexual abuse committed by clergy, a successful allegation of conspiracy, or aiding and abetting, would have to show that the officials "shared in the criminal intent" of the actual abuser. *See* Ryan v. Roman Catholic Bishop of Providence, No. PC95-6524, 2003 R.I. Super. LEXIS 104, at *13–14 (Aug. 26, 2003).

125. I put to one side the difficult questions relating to the character and proper reach of nonconsummate or inchoate offenses such as conspiracy. *See generally* United States v. Recio, 537 U.S. 270 (2003); Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL OF RIGHTS J. 1 (1992); Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

126. Some plaintiffs *have* alleged that church officials aided and abetted the actual perpetrators, or conspired with them prior to the acts of sexual abuse, for the purpose of committing the abuse. These tend to be boilerplate allegations, however, without factual support. *See, e.g.*, Kelly v. Marcantonio, 187 F.3d 192, 202 n.6 (1st Cir. 1999); Gibson v. Brewer, 952 S.W.2d 239, 245 (Mo. 1997); *Ryan*, 2003 R.I. Super. LEXIS 104, at *23; *cf.* See

involvement or aiding and abetting, they tend to arise as causes of action against the institution for negligent hiring, negligent supervision, vicarious liability, and the like. Many courts have dismissed such suits as unduly interfering in the core autonomy of religious groups to select and direct their clergy.[127] Others courts, however, have been more open to these causes of action, at least when they can be pursued by way of so-called neutral principles of law.[128]

The issue of institutional liability arising out of clergy abuse is difficult precisely because, as noted, the state has a legitimate right to deter, punish, and award compensation for sexual abuse, and

v. Bridgeport Roman Catholic Diocesan Corp., No. CV 930300948S, 1997 Conn. Super. LEXIS 2098, at *37 (July 31, 1997) (dismissing a civil conspiracy claim on the basis of the intracorporate conspiracy doctrine, since defendant church officials allegedly conspired with each other, but not with the perpetrator priest).

More plausibly, plaintiffs have alleged, particularly as a basis for demonstrating a continuing tort and thus avoiding a statute of limitations, that church officials engaged in a conspiracy to cover up sexual abuse or protect perpetrators. Courts have pointed out, however, the lack of a causal link between the alleged after-the-fact conspiracy and the sexual abuse itself. *See, e.g.*, *Kelly*, 187 F.3d at 203; *Ryan*, 2003 R.I. Super. LEXIS 104, at *15–16.

127. *See, e.g.*, Ehrens v. Lutheran Church-Missouri Synod, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991); Swanson v. Roman Catholic Bishop, 692 A.2d 441 (Me. 1997); H.R.B. v. J.L.G., 913 S.W.2d 92, 99 (Mo. Ct. App. 1995); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) (alternative ground of decision; primary holding rested on statute of limitations); Doe v. Archdiocese of Milwaukee, No. 03-1416, 2004 Wisc. App. LEXIS 616 (July 30, 2004); *cf.* L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997) (adult victim).

128. *See, e.g.*, Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d 139 (D. Conn. 2003); Smith v. O'Connell, 986 F. Supp. 73, 76–77 (D.R.I. 1997); Rosado v. Bridgeport Roman Catholic Diocesan Corp., 716 A.2d 967 (Conn. Supp. 1998); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); J.M. v. Minn. Dist. Council of the Assemblies of God, 658 N.W.2d 589 (Minn. Ct. App. 2003); Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 812 (Minn. Ct. App. 1992); Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); Kenneth R. v. Roman Catholic Diocese, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997); *see also, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993) (adult victim); Smith v. Privette, 495 S.E.2d 395, 398 (N.C. Ct. App. 1998) (same).

Some courts have split the difference in various ways, allowing certain causes of action but not others. *See, e.g.*, *J.M.*, 658 N.W.2d at 594, 597 (Minn. Ct. App. 2003) (disallowing cause of action for negligent hiring of pastor, because it would "force the court into an examination of church doctrine governing who is qualified to be a pastor," but allowing cause of action for negligent retention, since the "standard used to determine negligent retention is based on neutral principles of law"); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997) (holding that the First Amendment barred causes of action for negligent hiring, ordination, and retention of, as well as failure to supervise, perpetrator priest, but allowing cause of action for *intentional* failure to supervise).

because, in principle, institutions, no more than individuals, do not enjoy blanket immunity from the state's reach.[129] On the other hand, it does seem odd to empower secular criminal and civil courts to tell churches who to hire and when to fire.[130] The challenge is where and how to draw the line.

129. Again, I put to one side here the complex, general questions on the relation between individual and institutional responsibility. *See generally* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986); KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS (1990); Susan Wolf, *The Legal and Moral Responsibility of Organizations*, *in* NOMOS XXVII CRIMINAL JUSTICE 267 (J.R. Pennock & J.W. Chapman eds., 1985); Rosa Eckstein, Comment, *Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended*, 45 U. MIAMI L. REV. 843 (1991). *See also* Part IV.B *infra* (discussing accounts of vicarious liability).

130. As one of my colleagues reminded me on reading a draft of this Article, the tort system would not *literally* tell a church who to hire and when to fire. To the contrary, my colleague insisted, "a finding of tort liability only shifts a loss from one party to another. It imposes a cost on the defendants, a cost that may be covered to some extent by insurance, but whether the defendants are willing to continue engaging in activity that runs the risk of those costs is left to them."

This view certainly has support in current thinking about the nature of the law of torts. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (describing liability rules in tort, as distinguished from rules of property law or criminal law, as allowing but regulating the involuntary transfer or destruction of a legal entitlement); *cf.* Cippolone v. Liggett Group, 505 U.S. 504, 536 (1992) (Blackmun, J., concurring in part & dissenting in part) ("[In the context of an argument over federal preemption of state tort remedies,] the question whether common-law damages actions exert a regulatory effect . . . is . . . complicated. . . . The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action . . . is required."). I find little comfort in this observation, however.

To begin with, one need not entirely reject the insights of legal realism or economic analysis to believe that tort law, though it operates through the medium of financial compensation, can also at some level be an arena for the articulation and enforcement of behavioral norms. *See* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1358 (1986) (suggesting that liability rules can, depending on the context, either legitimate forced transfers or enforce rights-based entitlements, and arguing that the "claim that liability rules invariably constitute forms of legitimate transfer is ludicrous"); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 67 (1998) (emphasizing that courts in a tort suit "must say something about what category of conduct by one person affecting another is from now on to be considered enjoined by law, not simply about what fact patterns will now lead a court to provide a remedy"). Indeed, it would not take a full-blown corrective justice account of all of tort law, *see*, *e.g.*, ERNEST L. WEINRIB, THE IDEA OF PRIVATE LAW (1995), to observe that, at least with respect to the sorts of torts at issue in the sexual abuse arena, serious normative regulation of underlying behavior is being attempted, *cf.* Guido Calabresi, *The Simple Virtues of the Cathedral*, 106 Yale L.J. 2201, 2205 (1997) ("The nature of the entitlement depends on the circumstances. . . . [When, for example] does society say you must pay Y plus Z, but you must also suffer stigma, because society doesn't really want you to take my entitlement? . . . These [and others] are the

B. The Logic of Duties

The first step to digging our way out of this dilemma is to understand that the issues raised in most of these church liability cases implicate an important and difficult puzzle in tort law generally: the liability of parties for failing to do enough to prevent the torts or crimes of others. Indeed, the two sets of puzzles (those arising out of consideration of the proper legal relation between religion and the state, and those arising out of tort law and theory) are strikingly intertwined and best considered in tandem.[131]

The traditional black-letter tort rule is that, absent special considerations, parties are indeed *not* liable for failing to prevent the misdeeds of another.[132] No *general* duty exists "so to control the

questions that are ultimately worth asking. And that is why I find the abstract discussion of when property rules are better than liability rules not all that helpful.").

Second, even the view that liability rules merely regulate the terms of involuntary but legitimate transfers does not take normativity out of the equation, since such a liability rule presupposes an initial entitlement recognizing in plaintiffs a right to a state of affairs for whose loss defendant churches must compensate them. *See* Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 MICH. L. REV. 1 (2001) (emphasizing the conceptual and practical independence of the choice of initial entitlement, which is bound up in considerations such as equity, and the choice among various types of rules to effectuate that entitlement); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L. J. 585, 593 (2003) ("Economic analysis cannot determine [which party] . . . should hold the initial entitlement. Instead, normative justification determines initial entitlements, which then determine the categories of buyer (injurer) and seller (victim) for purposes of economic analysis." (citations omitted)).

Third, even if tort law did not rest on and express any normative judgments, it would still impose financial consequences on certain conduct and, thereby, put defendants to the choice of facing those consequences or changing their conduct. And if any of the broad principles of *Sherbert* does survive *Smith*, it is the insistence that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as" more direct regulation. *Sherbert*, 374 U.S. at 404.

Finally, to the extent that the imposition of tort liability on churches is based on something other than normative judgment, such as a purely distributional notion of insurance or cost-spreading, that in itself, for reasons I discuss *infra* at notes 172–74, should be a reason to be wary of it.

131. As noted earlier, *supra* note 17, I have argued elsewhere for the centrality of nonconstitutional or subconstitutional issues to a full understanding of the problems of religion and law. *See* Perry Dane, *Constitutional Law and Religion*, *supra* note 18 at 113; Perry Dane, *supra* note 17, at 21.

132. *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683, 694 (6th Cir. 2002); Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368, 1370 (Ala. 1986); C.J.W. v. State, 853 P.2d 4, 10 (Kan. 1993); Greater Houston Trans. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990); *cf.* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989) (limiting governmental duty under the Fourteenth Amendment to protect persons from private violence). *See generally* DAN B. DOBBS, THE LAW OF TORTS § 322 (2001); 3 FOWLER V.

conduct of a third person as to prevent him from causing physical harm to another."[133] This principle is part of a larger constellation of liability-limiting ideas in traditional tort law and theory that also includes, for example, the more well-known rejection of a general duty to rescue.[134] It builds on, and exemplifies, the deep, if controversial, notion that actors do not owe a duty to "the world at large."[135]

Even absent a general duty, however, traditional tort law does recognize that distinct duties of protection can arise under certain circumstances. In particular, the existence of certain "special relationships" can justify liability for a failure to prevent harm by another.[136] For example, an employment relationship, involving control and supervision by the defendant over the actual perpetrator, can trigger a duty of care in exercising such control and supervision.[137] Similarly, a distinct fiduciary or equivalent relation of

HARPER ET AL., THE LAW OF TORTS § 18.7, at 738 (1986). Classic older treatments of the topic include Fowler V. Harper & Posey M. Kime, *The Duty To Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

133. RESTATEMENT (SECOND) OF TORTS § 315. As I discuss *infra*, and as detailed in this same Restatement section and elsewhere, the general principle is subject to various important qualifications. *See infra* Part IV-B-2.

134. *See* RESTATEMENT (SECOND) OF TORTS § 314 (concluding that a party "realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action").

135. *See, e.g.*, Sage v. United States, 974 F. Supp. 851, 867 (E.D. Va. 1997) (applying Virginia law in case under the Federal Tort Claims Act to reject federal liability for the Military's and VA Hospital's failure to control conduct of a schizophrenic on-duty officer so as to prevent him from indiscriminately gunning down four pedestrians in Philadelphia); Valentine v. On Target, Inc., 727 A.2d 947, 951 (Md. 1999) (dismissing a suit against a gun dealer for negligently allowing a gun on display to be stolen and used in a crime; holding that "One cannot be expected to owe a duty to the world at large to protect it against the actions of third parties, which is why the common law distinguishes different types of relationships when determining if a duty exists"). For the origin of the phrase, however, see *infra* note 171.

136. Thus, the full text of RESTATEMENT (SECOND) OF TORTS § 315, already quoted in part, reads that:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

137. *See, e.g.*, Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc., 49 S.W.3d 107, 115 (Ark. 2001) (holding that in a suit against a nursing home for negligently supervising a nursing assistant who sexually abused a comatose patient, the employer has duty to protect third-parties from foreseeable risks that employees pose to third parties); Marquay v. Eno, 662 A.2d 272, 281 (N.H. 1995) ("[A] school district or school administrative unit . . .

trust between the defendant and the plaintiff can trigger a special duty to protect the plaintiff from harm.[138]

1. The problem with special duties

This analytic structure of traditional tort law—the rejection of any general duty to protect against the wrongdoing of third parties, qualified by the possibility of such a duty in the context of certain "special relationships"—explains the form of the causes of action in typical suits against churches for abuse by their clergy: negligent retention, negligent supervision, breach of fiduciary duty, and the like. It also explains why some of those cases involve specific inquiries

has a duty not to hire or retain employees that it knows or should know have a propensity for sexually abusing students.").

According to the Restatement of Torts,

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317. As this language makes clear, this duty to control is most germane when an employee's acts are outside the "scope of employment," so as to exclude vicarious liability on the employer's part, but are nevertheless "closely enough connected with the employment in time and space to give the master a special opportunity to control the servant's conduct." 3 HARPER ET AL., *supra*, note 131, § 18.7, at 738.

138. *See, e.g.*, Schneider v. Plymouth State Coll., 744 A.2d 101, 105 (N.H. 1999) ("In the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one."); Douglass v. Salem Cmty. Hosp., 794 N.E.2d 107, 120 (Ohio 2003); *see also* Niece v. Elmview Group Home, 929 P.2d 420, 426–27 (Wash. 1997) ("A group home for developmentally disabled persons has a duty to protect residents from [sexual] predators regardless of whether those predators are strangers, visitors, other residents, or employees. . . . The duty to protect another person from the intentional or criminal actions of third parties arises where one party is entrusted with the well being of another. Given [plaintiff's] total inability to take care of herself, Elmview was responsible for every aspect of her well being. This responsibility gives rise to a [qualified] duty to protect . . . vulnerable residents from a universe of possible harms." (citations and internal quotation marks omitted)); RESTATEMENT (SECOND) OF TORTS § 314A cmt. A (listing four specific "special relations" giving rise to a duty to protect, including the relation of a common carrier to its passengers and an inn to its guests, but expressing "no opinion as to whether there may not be other relations which impose a similar duty").

into the particulars of the legal bond between the church and the perpetrator[139] or between the church and the victim.[140] But it is this very structure of analysis that should be of concern with respect to the institutional autonomy of religious organizations.

Consider the relationship between a church organization and a member of its clergy. Some Roman Catholic bishops and other hierarchal church leaders, for example, have occasionally suggested that diocesan priests were not their employees at all, but "independent contractors."[141] As a public relations matter, this strategy might be disastrous, conjuring up a contrived and unseemly effort to escape moral culpability. But it is not legally absurd. The precise relationship between a Catholic bishop and diocesan priest, or an Episcopal bishop and a priest, is complex under canon law and church practice. More deeply, however, this example illustrates why the secular law should be exceedingly careful about imposing liability under such circumstances. Indeed, there are several intertwined and reinforcing reasons for caution in relying on a church's "special" duties as a basis for liability.

To begin with, the inquiry itself—whether into the question of employment or the question of fiduciary relation or the like—is itself potentially intrusive, entangling, and high-handed.[142] Moreover, the task of translation risks a misreading of the internal logic of the

139. *See, e.g.*, Enderle v. Trautman, No. CIV.13-01-22, 2001 WL 1820145, *14–16 (D.N.D.); Moses v. Diocese of Colo., 863 P.2d 310, 322–23 (Colo. 1993); Doe v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints, 98 P.3d 429, ¶ 11, 2004 UT App 274, ¶ 11 (Utah Ct. App. 2004) (finding that a Mormon "high priest" accused of sexual abuse was not an employee, agent, or clergy member of the church because the church had no control over his conduct at the time at issue).

140. *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999); Doe v. Norwich Roman Catholic Diocesan Corp., 309 F. Supp. 2d 247 (D. Conn. 2004); *Moses*, 863 P.2d 310; Bryan R. v. Watchtower Bible & Tract Soc'y, Inc., 738 A.2d 839 (Me. 1999).

141. *See* Diana Jean Schemo & David M. Herszenhorn, *Egan Is Leaving 'Unfinished Work' on Abuse, Victims Say*, N.Y. TIMES, June 16, 2000, at B1 ("The diocese has also advanced a novel defense, arguing that priests are independent contractors. A lawyer for the diocese, Joseph T. Sweeney, likened the role of the diocese to that of the courts, which license attorneys but are not responsible for their behavior."). In fact, this theory was not so novel. *See* Marianne Perciaccante, Note, *The Courts and Canon Law*, 6 CORNELL J.L. & PUB. POL'Y 171, 202–03 (1996); *cf.* Medina v. Karcsinski, No. CV990365802, 2003 Conn. Super. LEXIS 2083, *18–19 (July 21, 2003) (raising issue in a suit arising out of an auto accident during a cross-country youth trip led by a parish priest); Brillhart v. Scheier, 758 P.2d 219, 222 (Kan. 1988) (auto accident).

142. For a particularly thorough and incisive analysis of this problem, see Lupu & Tuttle, *supra* note 14, at 1834–45.

religious situation. In the Catholic context, for example, there is a good argument, which some church officials have advanced both as a canonical matter and as a secular legal strategy, that no secular category, whether "employee" or "independent contractor," fully captures the nature of the relationship between bishop and priest.[143] Now, it might be argued that the task at hand is not to "translate" religious categories into secular terms, but just to apply secular law to a set of facts.[144] Even under that conceptualization, however, the effect is to force a church to conform its behavior to the requirements of the secular legal pigeonhole that comes closest—though perhaps not very close at all—to its own ecclesiastical reality. Recall here, again, that we are not talking about general duties, but about special duties arising out of "special relationships." And the problem is that, rather than allowing churches to define those relationships in their own theological terms, a liability regime forces the church to behave according to one or the other of the standards that attach to those labels. As some courts have pointed out, subjecting churches under these conditions to suits for "negligent supervision" and the like is not very different from the almost universally rejected effort to subject individual ministers to causes of action for "clergy malpractice."[145]

143. As one commentator has bluntly put it:

> Misleading classifications of the relationship between the pastor and his diocesan bishop should be excluded [in the legal organization of a parish]. References to the pastor as an "employee" of a bishop, or a broad classification of the relationship under the respondeat superior theory provide an uncomfortable fit. Some authors attempt to evaluate whether a priest is an "agent" of a diocesan bishop or describe the priest as an "independent contractor." These classifications should be used sparingly as they weaken proper understanding of the relationship between a pastor and bishop, suggesting a secular relationship which the courts may determine is susceptible to their review. It would be advisable to refrain from using these and other secular terms, such as independent contractor, when describing the relationship of a priest to the bishop.

Sr. Mary Judith O'Brien, *Instructions for Parochial Temporal Administration*, 41 CATH. LAW. 113, 139 (2001) (footnotes omitted).

144. *See* Malicki v. Doe, 814 So. 2d 347, 364 (Fla. 2002) ("The core inquiry in determining whether the Church Defendants are liable will focus on whether they reasonably should have foreseen the risk of harm to third parties. This is a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not foresee 'excessive' entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law.")

145. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 326 (S.D.N.Y. 1991); Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997); Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997).

The most fundamental and foundational concern remains even if we assume that the secular law could be sufficiently deferential, nuanced, and accurate in its findings, and for that matter, even if underlying issues such as an employer-employee or fiduciary relationship are not formally in question. The real problem is that the state should not base a regime of responsibility or liability that potentially intrudes on internal church administration on causes of action (such as negligent supervision, breach of fiduciary duty, and the like) that, by definition, seek to regulate a relationship, the nature of which is grounded in religious concepts, considerations, and norms.[146] Whatever "special relationships" might exist, or not exist, in the internal workings of a religious community, they should just be opaque to the gaze of secular law, at least when that law threatens to interfere with the internal discipline and organization of religious life. Religious institutional autonomy, understood as robustly as I have urged in the course of this Article, should at least demand *that*.

To be sure, religious institutional autonomy is a complex and multivalent idea.[147] In some contexts, the law has no choice but to put religious phenomena into secular pigeonholes. Indeed, to a large extent, the very ability of the law to treat churches as institutions with legal personality that act through the agency of natural persons depends on such pigeonholing.[148] On the other hand, the law, in

146. *Cf.* Richelle L. v. Roman Catholic Archbishop, 130 Cal. Rptr. 2d 601 (Cal. Ct. App. 2003) (rejecting an effort to ground a claim of plaintiff's special vulnerability, and therefore a fiduciary relationship between plaintiff and priest, on plaintiff's "deeply religious" disposition).

147. *See supra* Part III.

148. In this connection, it is important to concede that the claim of "vicarious liability," which has also been urged in sexual abuse cases brought against churches, presents issues very different from those raised by causes of action for negligent supervision and the like. In evaluating vicarious liability, the question is not whether an employer should be held to a distinct set of responsibilities in its control of its employees, apart from the duties that the employees themselves owe. Rather, the problem is best understood as arising out of an unavoidable question of definition: In the face of an underlying act (such as an act of sexual abuse) for which, by hypothesis, the doer of that act should be liable, how can the law best conceptualize *who* that doer is? As Ernest Weinrib puts it, when the connection between an employee and an employer is sufficiently strong, and when the employee is acting within the scope of his employment, "the law constructs a more inclusive legal persona, the-employer-acting-through-the-employee, to whom responsibility can be ascribed." WEINRIB, *supra* note 130, at 187. To be sure, there is another understanding of vicarious liability, as simply a distinct form of strict liability. *See* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1752 (1996) (criticizing Weinrib's account). Even strict liability, however, would be less normatively entangling than imposing

various and varied contexts, has followed the salutary principle, whether under constitutional compulsion or not, of trying to treat religions alike, without undue regard to theological or organizational differences among them. Thus, for example, virtually all bona fide churches are treated as genuine "charitable" institutions, regardless of the actual, tangible, "public benefit" they provide.[149] Or consider the obscure but deeply emblematic example of the "parsonage" exemption in tax law,[150] under which all clergy persons are granted the same right to deduct the value of their housing, regardless of whether such housing would be treated under general principles of tax law as lodging that the "the employee is required to accept . . . on the business premises of his employer as a condition of employment."[151] The effect of this provision is to render opaque to the tax law, and avoid any inquiry into, the variety of ecclesiastical and organizational differences in the relation of churches to their clergy. Similarly, though with obviously much deeper stakes on both sides of the balance, in drawing the appropriate line between the important power of tort law to deal with sexual abuse and the autonomous jurisdiction of religious institutions in matters of their own government, the very sound of such phrases as "negligent supervision" and "fiduciary relationship," and the parsing that they necessarily imply, should help make clear where that boundary belongs.

the sort of duties implied by causes of action such as negligent supervision. *See* Lupu & Tuttle, *supra* note 14, at 190 ("Even if judicial determination of which entity has the powers to hire, supervise, and retain is constitutionally problematic when the plaintiff claims that a religious institution has been negligent in its performance of those functions, the constitutional problem might be avoidable when the court is analyzing a claim of vicarious liability." (citations omitted)).

Most courts have rejected vicarious liability claims in church sexual abuse cases on the grounds that such abuse is beyond the scope of the employment. *See supra* note 137, 139.

149. *See* Walz v. Tax Comm., 397 U.S. 664 (1970). For a general discussion of this principle, and a comparative look at the very different approach taken by British law, see Dane, *supra* note 17.

150. 26 U.S.C. § 107 (2004).

151. 26 U.S.C. § 119(a) (2) (2004).

2. The possibility of general duties, and alternatives in tort law

Am I suggesting, then, that in effect churches should ordinarily[152] be immune from suits arising out of sexual abuse of children by their clergy? Simply put, not necessarily.

I have, for the sake of exposition, spoken so far in terms of "traditional" tort doctrine. But the "traditions" of tort law are no longer what they were. As one commentator explained, "It is a truism that tort law changed in character sometime in the middle of the twentieth century. At some point—maybe 1950, maybe 1960—tort experienced . . . a plaintiff-oriented expansion."[153]

As related to our topic, this expansion in tort liability has resulted in the stretching and reconsideration of the traditional categories of "special relationships," most notably in the famous *Tarasoff* case,[154] which held that psychotherapists have a duty to use reasonable care to warn third parties threatened by their patients.[155] Even more directly germane, however, has been the emergence of a set of rubrics under which courts have found liability for failures to protect outside the traditional paradigm of "special relations."

Some of these rubrics arise out of a defendant's distinctive capacity or opportunity to protect others from harm. For example, while the traditional rule has been that landlords (unlike innkeepers) do not "owe an affirmative duty to protect tenants from criminal activity merely by reason of the relationship,"[156] some courts have

152. Note, again, that I have narrowed the inquiry to exclude the sort of particularly egregious conduct that could qualify as "aiding and abetting" or "civil conspiracy." *See supra* note 124.

153. Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1031 (2003) (quoting THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 46 (2001)). A detailed discussion of the sources, history, scope, character, and possible retrenchment of the various revolutions in American tort law is well beyond the scope of this article. For some guideposts, however, in addition to Sebok's article, see also G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1985) (expanded ed. 2003); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDIES 461 (1985); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

154. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

155. *Id.* at 345.

156. *Cf.* Cramer v. Balcor Prop. Mgmt., 848 F. Supp. 1222 (D.S.C. 1994). For other cases adhering to this traditional position, see Hall v. Rental Mgmt, Inc., 913 S.W.2d 293 (Ark. 1996); Rowe v. State Bank of Lombard, 531 N.E.2d 1358 (Ill. 1988); *see also* Feld v.

modified or rejected that doctrine, requiring landlords under various circumstances to act reasonably to try to protect persons on their premises from the criminal attacks of tenants, invitees, or even trespassers.[157] A different line of cases requires mobile ice cream vendors, for example, to use reasonable care to protect their young customers from the negligence of passing cars.[158] In one of those cases, the Connecticut Supreme Court, notably, first invoked the boilerplate that without "some relationship . . . between the person injured and the defendant, by which the latter owes a duty to the former, there can be no liability for negligence," but then held, in effect, that a duty-creating "relationship" exists whenever "the activities of two persons come so in conjunction that the failure by one to exercise that care is likely to cause injury to the other."[159] Also worth mentioning, if only to indicate the scope of the current discourse, are more cutting-edge, and often unsuccessful, movements, such as efforts to hold producers of violent entertainment liable on the basis of crimes committed by consumers of such entertainment.[160]

Another rubric, somewhat more grounded in traditional doctrine, emphasizes that malfeasance (as opposed to nonfeasance)

Merriam, 485 A.2d 742, 746 (Pa. 1984) (emphasizing "the crucial distinction between the risk of injury from a physical defect in the property, and the risk from the criminal act of a third person," though conceding limited circumstances under which a landlord might be held liable for a failure to protect).

157. *See* 3 HARPER ET AL., *supra* note 132, § 18.7, at n.17. According to another treatise, the traditional rule

> has been under siege for decades now, and many courts have now imposed a duty of reasonable care to maintain the physical condition of the premises so as to minimize the risk of assaults and robberies, which often involve rapes and killings of women or sexual molestations of children. It may even be fair to say that the landlord always owes care that is reasonable in the light of all the circumstances.

DOBBS, *supra* note 132, § 325, at 880–81. Landmark cases in this trend include, for example, *Kline v. 1500 Massachusetts Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983); *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76 (N.J. 1975).

158. *See, e.g.*, Neal v. Shields, Inc., 347 A.2d 102 (Conn. 1974); Thomas v. Goodies Ice Cream Co., 233 N.E.2d 876 (Ohio Ct. App. 1968).

159. *Neal*, 347 A.2d at 107–08 (quoting Borsoi v. Sparico, 106 A.2d 170 (Conn. 1954)).

160. *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, 188 F. Supp. 2d 1264 (D. Colo. 2002) (suit arising out of Columbine shootings); Davidson v. Time Warner, Inc., No. V-94-006, 1997 U.S. Dist. LEXIS 21559, at *31 (S.D. Tex. March 31, 1997). *See generally* Lillian R. BeVier, *Controlling Communications That Teach or Demonstrate Violence: "The Movie Made Them Do It,"* 32 J.L. Med. & Ethics 47 (2004).

can be actionable if that malfeasance results in physical harm. In one case, for example, in a state that adhered to the older rule protecting landlords, a particular landlord who undertook to "take care of the problem" of a tenant's dangerous pit bulldog, but did not, was held liable to a victim that the dog subsequently mauled.[161] The court's language was particularly relevant for our purposes: The landlord had "no initial duty" to protect third parties

> from injuries caused by his tenants' escaped pit bulldog. However, once he was cajoled . . . into *doing* something about the dog and then *did* something by way of enforcing a rather specific plan for securing the dog, he was in a position of having engaged in an undertaking to assure performance of [the tenant's] duty to protect others against the risk of dog attack. This undertaking was not possible without the power that [the landlord] had to impose the terms of the undertaking; but, still, [the landlord's] duty to the world . . . *was a duty as an ordinary person and not as a landlord*.[162]

In another case, a South Dakota court held that

> On the whole, we recognize no general duty to protect one's fellow human beings from crime, and that rule equally applies to the ordinary relationship of landlord and tenant. If a duty exists for such protection, it must originate from some special relationship imposing an obligation to protect another from crime based on a position of dependence intrinsic to the relationship. A special relationship can occur between common carriers and passengers, innkeepers and guests, business owners and invitees, and employers and employees. . . .
>
> On the other hand, the special relationship test is not the only rule applicable in this case. There are compelling reasons to depart from the restrictive common law conception of landlord liability for

161. Wright v. Schum, 781 P.2d 1142, 1144 (Nev. 1989). The *Wright* court relied in part on RESTATEMENT (SECOND) OF TORTS § 324A:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

162. *Wright*, 781 P.2d at 1146 (emphasis added).

> leasehold injuries. . . . A home is a citadel, and its integrity depends, at least in part, on its locks. A locked door is the first defense to a violent world. Landlords who insist on control over decisions on changing tenant locks may bear some limited responsibility to their tenants when locks need to be changed or repaired in the face of foreseeable imminent danger. We conclude that although no special relationship was created in this circumstance, the policy controlling the changing of tenant locks placed defendants in a position of heightened responsibility to their tenants.[163]

Similarly, the act of giving a loaded gun to someone known to be inclined to use it violently might be actionable even in the absence of any "special" duty.[164] As one court explained,

> Generally, with respect to nonfeasance, there is no legal duty that obligates a person to aid or protect another. An exception has developed where a special relationship exists between the persons. However, defendant's act of handing a loaded gun to [his son] was not one of nonfeasance, but rather misfeasance. Therefore, the special relationship doctrine is inapplicable . . . .[165]

Less dramatically, but just as evocatively, persons might have a duty not to lull others into complacency. Thus, for example, misleading letters of recommendation, even in the absence of a "special relationship," can become the basis for liability if physical injury results.[166]

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163. Smith v. Lagow Constr. & Dev. Corp., 2002 S.D. 37, ¶¶ 12–14, 642 N.W.2d 187, 190–91.

164. Ross v. Glaser, 559 N.W.2d 331 (Mich. Ct. App. 1996).

165. *Id.* at 334 (citations omitted).

166. *See, e.g.*, Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997). Regarding misrepresentation, RESTATEMENT (SECOND) OF TORTS § 310 provides that:

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
>
> (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
>
> (b) knows
>
> (i) that the statement is false, or
>
> (ii) that he has not the knowledge which he professes.

Similarly, § 311 provides that:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

All these cases and doctrines are fluid and controversial. One important reason is that, lurking beneath their surface, and sometimes right at their surface, is an entirely alternative account of tort law, an account that is, for better or worse,[167] deeply skeptical[168] of the sharp "duty/no duty" dichotomy on which the traditional rules were built.[169] This alternative tradition found famous seminal expression, for example, in Judge Andrew's dissent from Judge Cardozo's even more famous majority opinion in the *Palsgraf* case.[170] In that dissent, Andrews argued that the question of "duty" was not something apart from the other questions in a tort case, such as reasonableness and causation, but rather arose out of those other issues: "Every one owes to the world at large the duty of refraining

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

167. My own aim here is not to opine on the ideal state of tort law, but only to discuss the interaction of tort law and religious institutional autonomy.

168. *Cf.* John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001) (discussing "duty-skepticism"). Classic sources include, for example, W.W. Buckland, *The Duty To Take Care*, 51 L.Q. REV. 637, 639 (1935) (stating that the concept of duty is "an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice."); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934) (arguing that a concept of duty did not appear in tort law until the middle of the nineteenth century and was unnecessary to sound analysis). For a more recent contribution to this critical literature, see Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES IN LAW (2002), *at* http://www.bepress.com/til/default/vol3/iss2/art3 (last visited Dec. 1, 2004).

169. For discussions of the history of these two accounts and their interaction, see 3 HARPER ET AL., *supra* note 132, § 18.2; Goldberg, *supra* note 153; Goldberg & Zipursky, *supra* note 168, at 692–93; Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 97 (1994) (discussing the "growth and consolidation of the paradigm of reasonableness in modern and post-modern American tort law and to the steady, albeit slow, reconceptualization of tort duty and negligence law"); David Owen, *Duty Rules*, 54 VAND. L. REV. 767 (2001); Rabin, *supra* note 153.

As Goldberg and Zipursky point out, the term "duty" has many meanings, and skepticism about "duty" can take many forms. Goldberg & Zipursky, *supra* note 168, at 660–64. In this discussion, I am referring, not to a jurisprudential skepticism about the coherence of the notion of "duty," but a normative skepticism about whether, in tort law, the finding of a relation of a specific "duty" between plaintiff and defendant needs to precede the inquiry into whether the defendant unreasonably put the plaintiff at risk of harm.

I am also excluding from my discussion here broader issues in the normative theory of tort, such as critiques of the entire "fault" system itself.

170. Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

from those acts that may unreasonably threaten the safety of others."[171] Variations on this view have also for much of the twentieth century been taken up by commentators who urged the rejection of arguably arbitrary categories of "duty" and "no duty" in favor of a single, broadly defined, duty to act reasonably under the circumstances.[172] It has even found its way, at least to some extent, into draft versions of the Restatement (Third) of Torts.[173]

More saliently for our purposes, this idea of general duties has been taken up by at least some state courts.[174] The *Tarasoff* court, for

171. *Id.* at 103. Some trace back this idea to Judge Brett's opinion in the late nineteenth-century English Court of Appeals case of *Heaven v. Pender*:

> [W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

11 Q.B.D. 503, 509 (C.A. 1883) (Brett, M.R.).

172. Most notably among mainstream doctrinal scholars are PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357–58 (5th ed. 1984) (arguing that concept of duty is not doctrinally useful, and that it "is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

As particularly relevant to our issue—liability for a failure to protect against harms caused by third parties—see, for example, John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties To Aid or Protect Others*, 1991 WIS. L. REV. 867, 870 ("[I]n lieu of the traditional approach, courts should impose upon a defendant nothing more nor less than an obligation to act reasonably under the circumstances unless, on balance, there are recognized policy concerns that militate against the imposition of that duty. The decision can be made adequately whether the defendant's behavior is characterized as misfeasance or nonfeasance, and whether or not the parties share a 'special relationship,' as long as a court explicitly analyzes the same kinds of factors that might in other situations prevent it from imposing a duty to behave reasonably."); James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147, 170–73 (1980). For one important, broader analytic account, see Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

173. Rather than treating the existence of a relational "duty" as a fundamental prerequisite to tort liability, the draft of the Third Restatement states simply that "[a]n actor is subject to liability for negligent conduct that is a legal cause of physical harm," RESTATEMENT (THIRD) OF TORTS § 3 (Discussion Draft), and then qualifies that broad principle with the incidental assertion that "[e]ven if the defendant's negligent conduct is the legal cause of the plaintiff's physical harm, the defendant is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff. Findings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability." *Id.* § 6. For critical discussions, see *Symposium*, 54 VAND. L. REV. (2001).

174. I am not suggesting an unstoppable, or even unidirectional, line of development. If anything, the current trend seems to be to the contrary. In the words of one commentator:

example, while nominally holding that a psychiatrist's duty to warn arose out of the "special relation" between the psychiatrist and his patient, also broadly suggested that the underlying principles at stake had more to do with considerations of foreseeability and a balancing of the parties' interests.[175] In other states, this view is explicit. The Oregon Supreme Court, for example, has emphasized the centrality of a particularized finding of foreseeability to determinations of liability and has suggested that references to "duty" are often verbal distractions.[176] Even more bluntly, the Wisconsin Supreme Court has

> Coincident with the election of Ronald Reagan to the Presidency in 1980, the expansionary period of tort law came to a rather screeching halt. Courts and commentators increasingly began to recognize the perils of the previous generation's failure to focus on the proper limits of tort law—on its failure to understand that tort law, like almost everything, is an evil in excess. Providing limitations on the reach of negligence and other types of tort claims is of course the basic office of the duty/no-duty concept, so that the beginning point of duty's resurgence may itself be fairly dated at about 1980. . . . During the 1980s and 1990s, in one context after another, courts increasingly turned away from simple foreseeability to some enriched version of duty in helping decide the proper limits on tort responsibility. As the twentieth century drew to a close, the increasing control by no-duty and limited-duty principles over the reach of tort law was widely, although by no means universally, endorsed by the commentators.

David Owen, *supra* note 169, at 775–76.

175. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342–46 (1976); *see* Lake, *supra* note 169, at 102, 127–28 ("*Tarasoff* challenges the Restatement (Second) of Torts approach to many 'no duty' questions, particularly in the rescue context, as well as traditional conceptualizations of 'duty.'" The opinion also "expanded the notion of a special relationship in a way that uncannily, if not explicitly, calls for eradication or amelioration of rules of no duty derived from or originating in 'common law' type ideas of 'nonfeasance,' such as those set forth in the Restatement itself."); Adler, *supra* note 172; Murphy, *supra* note 172, at 170–73.

The significance of *Tarasoff* also must be understood in relation to the California Supreme Court's decision in *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), which held, in the context of a reconsideration of landowners' duties to persons on landowner property, that

> the basic policy of this state . . . is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications [among trespassers, licensees, and invitees], and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion.

Id. at 118–19.

176. "Defendants sometimes deny liability . . . by arguing that although they may have breached a duty to someone, it was not a 'duty *to*' the plaintiff. But that argument can be more directly phrased in terms of foreseeability, and perhaps other reasons for extending or limiting the scope of liability for defendant's negligence, than by using the conclusory word 'duty' as a premise." Cain v. Rijken, 717 P.2d 140 (Or. 1986) (action against a hospital for negligently allowing a psychiatric patient to drive an automobile). In a more extended discussion of the

emphasized that "reliance upon a no duty-no liability theory is misplaced in Wisconsin: 'duty' exists when it is established that it was foreseeable that an act or omission to act may cause harm to someone."[177] The court further states that under this

> broad definition of duty, we need not engage in analytical gymnastics to arrive at our result by first noting that at common law, a person owes no duty to control the conduct of another person or warn of such conduct, and then finding exception to that general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of the conduct.[178]

C. General Duties and Religious Institutional Liability

The import of all these developments in tort law might be this: I have argued that we need to worry about holding churches liable in sexual abuse cases on the basis of "duties" grounded in "special relationships" that exist in the internal life of the religious community. That concern is sharply reduced, however, if a church can be held liable on the basis of a duty that is *general* rather than *special*,[179] whether that general duty arises out of a narrow rubric such as the nonfeasance/malfeasance distinction, or—in those jurisdictions where such a move might be available—out of a more fundamental rejection of the "no duty" paradigm at its core.

relevance of "duty," the Oregon Supreme Court similarly warned that "phrasing a conclusion in a particular case in terms of 'duty' or 'no duty,' without reference to any external standard, tends to turn into an apparent rule of law what may be only a determination concerning foreseeability in the circumstances of that case." Fazzorali v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1335 (Or. 1987).

177. Schuster v. Altenberg, 424 N.W.2d 159, 165 (Wis. 1988).

178. *Id.* at 165 n.3.

179. Interestingly, this distinction resembles the line drawn in some state doctrines of parental tort immunity. In those states, children can sue their parents for breach of duties the parents owe to the "world at large," but not for breach of those special duties the parents owe *as parents*. *See, e.g.*, Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974); Broadwell v. Holmes, 871 S.W.2d 471, 474 (Tenn. 1994); *see also* Sandoval v. Sandoval, 623 P.2d 800, 803 (Ariz. 1981), *overruled by* Broadbent v. Broadbent, 907 P.2d 43 (Ariz. 1995). The analogy is especially striking because the principal consequence of the rule is to immunize parents from suits for "negligent supervision." *See Sandoval*, 623 P.2d 800; Squeglia v. Squeglia, 661 A.2d 1007, 1012 (Conn. 1995) ("[T]he doctrine of parental immunity is particularly applicable in the area of parental supervision and discretion with respect to the care and control of a minor child."); *Holodook*, 324 N.E.2d 338.

Limiting church liability to causes of action that can be understood in such "general" terms would be conceptually more consistent with a healthy respect for religious institutional autonomy. More important, it would frame the issues in a way that is less intrusive into internal church affairs. Rather than speaking in terms of the vagaries of how a church "hires" or "retains" or "supervises" or fulfills its "fiduciary" obligations, a court could simply ask, in a focused and specific fashion, whether a church acted negligently in putting a child in harm's way. Under this approach, an abusing clergyperson would be treated as analogous (analytically though by no means morally) to a physical hazard on which a victim slips and falls, and suffers traumatic injuries.

D. Not Quite

This cannot be the end of the matter, however. Simply shifting from "specific" to "general" causes of action would not be, in itself, a cure-all. To begin with, the sort of "policy" inquiries implicit in at least some expansions of tort duty[180] would themselves run the risk of subjecting churches to unarticulated and perhaps arbitrary judgments about their distinctive responsibility as churches.[181] Indeed, it is worth considering in this connection, for example, that some courts have justified the sort of broad landlord responsibility I discussed earlier on the basis of a "social consensus" present in

180. *See, e.g.*, Zamstein v. Marvasti, 692 A.2d 781 (Conn. 1997); Kolbe v. State, 625 N.W.2d 721, 728 (Iowa 2001) ("In determining whether a defendant owes a legal duty to the plaintiff, three factors usually govern our analysis: (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. We use these factors under a balancing approach and not as three distinct and necessary elements. In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." (citation omitted)); Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988) (embracing a broad definition of duty to protect third parties, but also emphasizing that a wide range of "public policy" considerations could preclude liability in particular classes of cases).

181. *Cf.* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1740–41 (1998) ("At a more basic level, Holmesian skepticism about duty has not merely failed to explain the contours of negligence doctrine. It has rendered problematic the very institution of the common law of torts. . . . The Holmes-Prosser model has proved equally inept at generating a framework for analyzing negligence problems. Its core claim—that negligence turns on judicial policy analysis of the costs and benefits of different liability rules—tends to leave judges and juries to decide cases by means of the arbitrary, indeterminate, and doctrinally unstable device of factor balancing.")

modern life.[182] Similarly, the particularized inquiry implicit in some notions of a broad duty to act reasonably to prevent harm—the particularized inquiries suggested, for example, in the Oregon and Wisconsin decisions I have quoted[183]—might well reproduce, without at least the saving grace of settled doctrine, the intrusive examination of internal church affairs. Moreover, to the extent that broader doctrines of duty often shift the responsibility for making controversial value choices from judge to juries,[184] extending the duty might simply render the threat of intrusion or prejudice less transparent.

Another concern arises out of the larger landscape of contemporary tort discourse: The type of broad conceptions of liability I have discussed can easily be grounded in a search for less arbitrary, more normatively sound, conceptions of duty and responsibility. They can also arise, though, out of a search for "deep pockets"[185] or a purely compensatory conception of "enterprise liability."[186] To that extent, however, tort liability for churches can

182. *See* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335 (Mass. 1983); *cf.* Trusiani v. Cumberland & York Distrib., Inc., 538 A.2d 258, 261 (Me. 1988) ("In the decision of whether or not there is a duty, many factors interplay: the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." (citations and internal quotations omitted)).

183. Cain v. Rijken, 717 P.2d 140 (Or. 1986); *Schuster*, 424 N.W.2d at 165.

184. The classic discussion of this issue is found in the work of Leon Green. *E.g.*, LEON GREEN, JUDGE AND JURY (1930); Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928). For more recent treatments, see DOBBS, *supra* note 132, at § 182; William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699 (1997); L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 792 (2001); David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 TUL. L. REV. 135, 138 (1992); Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 33 (1977).

185. *Cf.* PETER HUBER, THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Linda S. Calvert Hanson & Charles W. Thomas, *Third Party Tort Remedies for Crime Victims—Searching for the "Deep Pocket" and a Risk Free Society*, 18 STETSON L. REV. 1, 33 (1988).

186. For discussions of notions of "enterprise liability" and their role in more expansive conceptions of tort liability, see, for example, Virginia E. Nolen & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835 (1996); Priest, *supra* note 153; Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996); Richard B. Stewart, *Crisis in Tort Law: The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987); Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919 (1994).

degenerate into a form of taxation that—contrary to principles of both neutrality and religious institutional autonomy—ends up penalizing historically entrenched and hierarchal churches simply because they tend to have a large fund of assets sitting under one legal title. Indeed, with regard to the Roman Catholic Church in particular, this sort of "taxation" based on organizational form is doubly pernicious to the extent that it also feeds into a traditional American bigotry against Catholic clericalism.[187]

Finally, particular lawsuits, or particular causes of action, or particular remedies might still raise other problems, entirely apart from any I have discussed so far, and outside the scope of this Article.

I will, however, cut the dialectic short here. My goal has not been to propose a definitive resolution, but rather to illustrate the complex interaction of a robust respect for religious institutional autonomy and an equally robust recognition that churches, as actors in society, cannot be entirely immune from the demands of secular law. In a sense I am suggesting that, to cross the threshold between secular law and religious nomos, tort law must get it "just right"—not too cold and not too hot, not too narrow and not too expansive. How this would all work out, in the final analysis, in suits against churches arising out of sexual abuse by their clergy, I am simply not sure.

V. CONCLUSION: THE IRONIES OF AUTONOMY

You will notice, I hope, something of an irony here. For I have returned, in a sense, to the *Smith* notion of "neutral, generally applicable laws," suggesting that a church could be held liable by virtue of neutral, general rules that do not rely on the "special" character of relations within the religious community. A church, that is to say, should be held liable, if at all, only for the same reasons that any one of us might be liable if we undertake to protect a vulnerable person, and botch it, or if we write misleading letters of

187. One sociologist, for example, has argued that the focus on sexual abuse in the Catholic Church in recent years arises not out of any greater incidence of misconduct by Catholic clergy, but out of a combination of, among other things, persistent anti-Catholic bigotry, traceable as far back as lurid Puritan tales of alleged Catholic sexual misconduct, the perceived deep pockets of a hierarchal church, and the wealth of diocesan records detailing personnel complaints going back many years. PHILIP JENKINS, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS (2001).

recommendation, or if we call a child across the street in the face of a careening automobile.

To some extent, this move reflects the genuine normative pull of ideas of generality and neutrality, a pull that, for better or worse, helps explain the holding in *Smith* and also helps explain the misreading of *Jones v. Wolf*, which I criticized in Part III of this Article. But notice how my argument here depends on understanding how "general" laws need to appreciate the "special" character of religious autonomy. In particular, the "neutral, generally applicable laws" I have in mind as potential sources of legitimate church liability are those that do not require trying to make secular sense of, or translate, the internal nomic reality of a religious institution or community. For while, in some contexts, the need for such translation is part of what might be required to guarantee autonomy, in other contexts, it is a threat to at least one sense of what autonomy requires. Indeed, this is the real point of connection between the idea of "neutral, generally applicable laws" in *Smith* and the notion of "neutral principles of laws" in *Jones v. Wolf*. For while some courts have used the "neutral principles of laws" language to justify intrusion into the internal life of churches, the real import of *Jones* is just the opposite.[188] Just as the *Jones* Court understood, in the church property context, the difficulties inherent in trying to reduce the structure of authority in churches into neat pigeonholes such as "hierarchal" or "congregational," and allowed resort to secular legal instruments as a way to avoid that inquiry, courts deciding sexual abuse cases should themselves be more cautious about fitting the various bonds of authority and affiliation of a church into the sort of neat pigeonholes on which the tort law idea of "special relationships" is built.

It is a fair question at this point, of course, why we should care about religious institutional autonomy in the first place, and why a simpler, more acidic, version of "neutrality" or "generality" should not rule after all. I have, in this Article, almost stubbornly avoided a direct defense of religious autonomy, satisfying myself instead with shoring it up against various points of attack. The reason for this is partly a matter of choice about the scope and emphasis of this particular Article. But it is also more basic: while I appreciate efforts to understand and defend religious autonomy functionally or

188. *See supra* note 77 and accompanying text.

historically,[189] I also believe that, in the end, respect for autonomy must rest on an essentially existential encounter with the "otherness" of the religious nomos.[190] For only that sort of existential insight can, with full conviction, reconceive and resituate the genuine and entirely legitimate pull of principles such as neutrality and generality.

There is, therefore, also a deeper irony in the discussion here. For all my efforts to distinguish the problem of exemptions from the problem of institutional autonomy—an effort by which I stand—the notion of institutional autonomy is yet again an emblem for a larger consideration of free exercise. This consideration must be left to another day. Suffice it to say that the challenge in both instances is to recognize how the application of otherwise apparently workaday general laws sometimes takes on a special, problematic charge when it seeks to reach across the fragile but vital gap that divides the secular and religious normative imaginations.

189. In this Conference, consider, for example, Kathleen A. Brady, *Religious Organizations and Free Exercise: the Surprising Lessons of Smith*, 2004 BYU L. REV. 1633; Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789; Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217.

190. I have made this sort of point before. *See* Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991) ("The recognition of another sovereign does not serve a purpose, as such, though purposes can be articulated for it. It is more of an existential encounter, a fact—if a socially constructed fact—of the world."); Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, in 4 LAW AND RELIGION: CURRENT LEGAL ISSUES 385 (Richard O'Dair & Andrew Lewis eds., 2001) ("[T]he impulse to appreciating legal pluralism arises, not merely out of theoretical commitments, but out of a process of existential encounter, as each normative system asks itself precisely what is going on outside the reach of its most solipsistic concerns."); Dane, *The Varieties of Religious Autonomy*, *supra* note 18.