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## Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle

*Mark E. Chopko\**

One dark side of human behavior is that some adults seek gratification of their sexual desires from children and others who are vulnerable to these violations. A regrettable part of institutional behavior is that, at times, those in charge compound this human behavior through inaction or poor judgment. Indeed, institutions with special responsibilities for the care of children—schools, social service agencies, day-care centers, religious institutions, youth organizations, and others—must call this behavior what it is: always wrong and violative of the law. Persons who would abuse a child have no place in any organization with responsibilities that involve the care of children.<sup>1</sup> Such conduct rightly deserves condemnation, and child-serving institutions may not allow such persons to work in them or shield them from prosecution.

The instant paper by Lupu and Tuttle makes a similar point: Religious organizations<sup>2</sup> have learned, in some instances the hard way, that some persons entrusted with leadership as clergy or ministers have abused children.<sup>3</sup> Religious organizations may not

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1. Cf. Pope John Paul II, Address to the Cardinals of the United States (Apr. 23, 2002), at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2002/april/documents/hf\\_jp-ii\\_spe\\_20020423\\_usa-cardinals\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_en.html) (last visited Nov. 30, 2004).

2. "Religious organizations" or "churches" in this Comment means any church, synagogue, temple, mosque, or other entity through which individuals gather in community for worship. It also encompasses other religious entities in that community such as schools, day-care centers, and other activities involving youth.

3. Ira C. Lupu & Robert Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1790–93.

choose to allow a person who they know has abused a child to exercise ministry and expect there will be no consequences if the person abuses again. For these organizations, education, prevention, and effective response should be the hallmarks of policies against abuse of children. When harm has been done, an apology is not enough—action is required.<sup>4</sup>

Religious institutions must show that they have learned the lessons from failing to protect children adequately. By and large, these lessons are seen in policies and programs that both respond to abuse and prevent it by educating parents and others about abuse before it happens. The results are seen in lowered rates of abuse as churches incorporate these policies and programs into action mechanisms.<sup>5</sup> But, in addition to preventing recurrences of abuse, churches must also heal the wound in the faith community caused by abuse and inaction.<sup>6</sup> To do so requires outreach and reconciliation, and often monetary compensation.<sup>7</sup>

Dean Nicholas Cafardi has written that Americans show their displeasure through litigation.<sup>8</sup> Using litigation as a yardstick, we are an unhappy people. Even though we might pretend otherwise in our communities and neighborhoods, the truth is that we do not all just “get along.” Lawsuits are filed between neighbors over fences, between parents over the conduct of the PTA, and between disagreeing Christians over doctrinal matters such as where the Truth lies.<sup>9</sup> Over the last generation, a number of factors have

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4. Cf. U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, pmb. (2002), at [www.usccb.org/bishops/charter\\_final.pdf](http://www.usccb.org/bishops/charter_final.pdf) [hereinafter CHARTER].

5. The John Jay Study commissioned by the USCCB provides one such example. See JOHN JAY COLLEGE OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES, § 2.3, at 28, fig. 2.3.1 (2004), at <http://www.usccb.org/nrb/johnjaystudy/index.htm> [hereinafter JOHN JAY STUDY]. In the decades preceding the actions and steps taken in Catholic dioceses, the numbers of abuse cases peaked. *Id.* After the implementation of policies and programs in the late 1980s, the rate reported in the 1990s and beyond dropped significantly. *Id.* While the possibility exists that additional cases will be forthcoming, there is a correlation between incidence rates and effective action.

6. CHARTER, *supra* note 4.

7. See Mark Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125 (2003).

8. See Nicholas Cafardi, *Giving Legal Life to Ex Corde Ecclesiae Norms: Corporate Strategies and Practical Difficulties*, 25 J.C. & U.L. 751, 765 (1990).

9. See Mark Chopko, *Emerging Liability Issues in Non-Profit Organisations: An Overview*, 8 CHARITY L. & PRAC. REV. 17, 18 (2002) (U.K.).

converged to make religious organizations more susceptible to suit. The expansion of liability theory is one factor that will be dealt with below. Another is the demise of charitable immunity generally,<sup>10</sup> which has, in turn, resulted in an increase in insurance and changes to the structure of churches.<sup>11</sup> Litigation is part of living and working in America, including practicing religion. When the subject of litigation is harm to children in this society, religious institutions have been caught up in a torrent of litigation.

Litigation over child abuse also mirrors the fact that society has lifted up the protection of children and has implemented better abuse- and neglect-reporting statutes. Beginning with the first mandatory reporting laws in 1974, society, through the law, has indicated that children deserve increased protection and attention.<sup>12</sup> The media has translated these legal expectations into greater public awareness. Greater numbers of abusive incidents are reported today than thirty years ago, and negative attention has resulted in criminal and civil litigation. Catholic Church agencies report that about 4,000 persons claiming to be victims of clergy abuse have come forward or been identified, through litigation, to Catholic dioceses and orders since 2002.<sup>13</sup> Every institution seems to face litigation, including churches.

However, unlike many corporate and business entities, it is difficult for religious organizations, whose main purpose is to provide for a worshipping community and for those in need of their care, to see litigation simply as a “cost of doing business.” In fact,

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10. Lupu and Tuttle say this is about the loss of the distinctive place of religion. Lupu & Tuttle, *supra* note 3, at 1798. The idea noted there, however, seems to be related more to a doctrinal shift on the Supreme Court, opening the “play in the joints,” *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970), for more government-imposed benefits and detriments. *Cf.* *Locke v. Davey*, 540 U.S. 712 (2004). I believe that it is not related to religion losing its distinctive perch as much as it reflects the growth of a regulatory government pervading society and pushing out other structures. One solution in fact could be a greater pursuit of “charitable choice” whereby genuinely religious institutions could choose to participate in public programs without losing their distinctiveness. Indeed such distinctiveness is what makes them valued and effective partners. But that article waits for another day!

11. *See Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992). In the course of the litigation, the Church incorporated with the intent to minimize future liability. *Cox v. Thee Evergreen Church*, 804 S.W.2d 190, 193 (Tex. App. 1991).

12. *See generally* National Clearinghouse on Child Abuse and Neglect Information, U.S. Dep’t of Health and Human Services (NCCANCH) (2004), at <http://nccanch.acf.hhs.gov> (last visited Nov. 30, 2004). The NCCANCH provides a comprehensive review of the problems, the needs, the laws, and the statistics associated with child abuse generally.

13. *See JOHN JAY STUDY*, *supra* note 5, § 5.2, at fig. 5.2.1.

litigation is alien to their works and practices.<sup>14</sup> Religious organizations serve the poor and needy by feeding the hungry, healing the sick, educating children, and comforting the brokenhearted. In these works, religious organizations depend on the charity of members and others as their primary sources of support. Due to the demise of charitable immunity, religious organizations also depend very much on insurance if losses occur due to the actions or inactions of the organization itself or those who minister in and for it. In at least three ways, churches are different from other defendants when considering their liability.

First, churches are generally not wealthy entities. They are charities that operate close to the line. Even in hierarchical churches, there is no treasure waiting to be spent. For example, more than ninety percent of the money collected in Catholic parishes on a Sunday morning stays in the parish to pay the bills, serve that community, and take care of their needs.<sup>15</sup> Based on my experience with other religious communities, a similar situation exists within other denominations. Religious organizations are, in this regard, public charities, very often without cash reserves available when faced with a prospect of catastrophic loss.

Second, most insurance and liability systems, including those under which churches operate, presume that actions seeking redress for losses will be filed in a time closely related to when the loss occurred. Not so in the case of sexual misconduct. Claims filed today, by an overwhelming margin, are for (mis)conduct that occurred twenty or more years ago.<sup>16</sup> The result is liability coverage

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14. In the fifth chapter of Matthew's Gospel, Jesus warns his disciples about allowing their disputes with their brothers and sisters to stand in the way of fellowship and faith. He preaches a peaceful resolution of disputes. *Matthew* 5:25. In the eighteenth chapter of the same gospel, fraternal correction is preferred to litigation. *Matthew* 18:15–17. When such correction fails, the parties are urged to take the dispute to the church for resolution. If the offender refuses to reform, the worst possible penalty is applied—the offender is treated as a tax collector. *Matthew* 18:17. See also Paul's exhortations on nonadversarial resolutions. *1 Corinthians* 6:5.

15. See CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE (CARA), INTERNATIONAL CATHOLIC STEWARDSHIP COUNCIL DIOCESAN PROFILE 2003, at 9 (2003).

16. Many Catholic dioceses reporting their claims experiences have indicated they have few claims for any misconduct occurring after about 1990. See, e.g., Roman Catholic Diocese of Albany, Diocesan Report: A Historical Accounting of Clergy Sexual Abuse of Minors in the Albany Diocese (Dec. 2003), at <http://www.rcda.org/HistoricAcct.htm> (last visited Nov. 30, 2004) (stating that two percent of the abuse is charged after 1990); Statement By Most Reverend Nicholas Dimarzio, Diocese of Brooklyn, On Clergy Sexual Abuse (Feb. 27, 2004),

that is often inadequate or unavailable. Insurance available for these claims was often purchased assuming lower rates of recovery when settlements of a generation ago would apply.<sup>17</sup> No one anticipated a spate of hundreds of claims, each seeking a seven- or eight-figure recovery, at a time when only a few hundred thousand dollars of total insurance was available.<sup>18</sup> Additionally, as businesses, insurers have treated religious organizations as they would any profit-making entity. They have turned away from their duty, denying coverage and refusing to defend large numbers of claims when it seemed to save the insurers money.<sup>19</sup>

Third, religious organizations have a special responsibility to heal the damage caused by those who have ministered for them. In justice, as I have written elsewhere, such claims should be received by the church, evaluated by its leadership, and mediated by the parties to a fair result.<sup>20</sup> A fair result presumes some form of compensation to those harmed that does not substantially impair the primary works of the religious agency to serve the ongoing human needs of a worshipping community.<sup>21</sup> When it is not possible to balance these demands justly, or when a party insists on resort to legal process, religious entities must defend themselves under the law, if only to preserve the ability to continue their primary works. Plainly, a pastoral approach that a religious organization might prefer to follow is far removed from the trial-by-combat that passes for litigation in twenty-first-century America. Nonetheless, the primacy of the pastoral approach must be the path for religious organizations. When the pastoral approach fails to resolve the conflict—and I pray it does not fail because of the hardheartedness of any church or its representatives—religious organizations must defend themselves in

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at [http://www.dioceseofbrooklyn.org/about/abt\\_bishop\\_statements\\_dimarzio.html](http://www.dioceseofbrooklyn.org/about/abt_bishop_statements_dimarzio.html) (last visited Nov. 30, 2004) (stating that 24 of 189 cases of abuse occurred after 1990); see also JOHN JAY STUDY, *supra* note 5 (confirming that priest-child abuse occurred mostly in the 1970s).

17. See Patrick Schiltz, *The Impact of Clergy Sexual Abuse Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 956–57 (2003).

18. See Adam Liptak, *Abuse Cases Pose Threat to Worship, Experts Say*, N.Y. TIMES, Apr. 6, 2003, at A3.

19. I reserve special criticism for insurance companies, but we are limited on space.

20. Chopko, *supra* note 7, at 150–51 & nn.138–39.

21. See *id.* at 154.

courts of law.<sup>22</sup> To do so effectively means they must walk the difficult path of healing God's injured people without sacrificing the other works of the worshipping community.

In this brief Comment, I endorse the conclusions reached by Lupu and Tuttle and believe their article, if applied by practitioners and courts, will add needed strength to the rights of religious institutions without sacrificing the rights of those injured by church ministers. I write to clarify additional areas in which their analysis could be expanded and offer remarks based on how cases are in fact litigated against churches, beginning with observations on the proper law to apply and which religious entities should be properly named and in what circumstances.

### I. CHURCHES ARE NOT ABOVE THE LAW

Religious organizations operate within the framework of the religion clause (or clauses) of the Federal Constitution and applicable state constitutions. These robust provisions, described in these conference papers, are not exceptions to the rule of law; they *are* the law that must be applied. The suggestion that these rules immunize churches wholesale against the consequences of their actions is not correct, as discussed below.<sup>23</sup> More to this point, however, the doctrine of church autonomy is a fundamental part of the law. Although that law is well described in these papers,<sup>24</sup> I wish to add these other notes.

First, the nature of church autonomy as described in case law implicates at least various aspects of the First Amendment: namely,

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22. In defending themselves, churches must still act like churches. Not every defense or every tactic is justified. I have been impressed when churches, victorious in litigation, immediately can reach a mediated result to provide healing and compensation. *See, e.g.*, ROMAN CATHOLIC DIOCESE OF PROVIDENCE, ANNUAL FINANCIAL REPORT OF THE CENTRAL ADMINISTRATION FUNDS AND DIOCESAN CEMETERY OPERATIONS OF THE DIOCESE OF PROVIDENCE 2002-2003 (Sept 26, 2003), *available at* [http://www.dioceseofprovidence.org/files/ANNUAL\\_REPORT\\_2003.pdf](http://www.dioceseofprovidence.org/files/ANNUAL_REPORT_2003.pdf); Press Release, Diocese of Camden, Settlement Reached in Sexual Abuse Case (March 13, 2003), *available at* <http://camdendiocese.org/pdf/Statement-FINAL.pdf>.

23. *See infra* Part II.C.

24. Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633; Lupu & Tuttle, *supra* note 3, at 1789; Perry Dane, "Omalous" *Autonomy*, 2004 BYU L. REV. 1715.

establishment, free exercise, free speech, and free association.<sup>25</sup> In specific cases, it may also implicate federal equal protection and due process protection,<sup>26</sup> and parallel provisions in state constitutions when they have been interpreted as more protective of religion than their federal counterparts.<sup>27</sup> Which ones are implicated, and when, depends on the circumstances of the case. For example, in litigation over the application of contraceptive insurance mandates to Catholic agencies, the religion clauses as well as free speech and association rights are implicated.<sup>28</sup> Usually in tort liability cases, only the religion clauses are involved, and even then only narrowly, so long as the courts are properly applying tort law, as discussed below.

Lupu and Tuttle root church autonomy within tort liability cases only in the Establishment Clause.<sup>29</sup> However, the Free Exercise Clause, even after *Employment Division v. Smith*,<sup>30</sup> offers protection for the communal and institutional expression of religion.<sup>31</sup> The religious organization has rights itself, and it is wrong, in every case, simply to view the entity as the aggregate of individual expressions.<sup>32</sup>

25. See Brief of Amici Curiae National Religious Organizations, Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004) (No. S099822), available at <http://www.usccb.org/ogc/amicuscuriae5.shtml>.

26. For example, if a regulatory scheme exempted some but not all religious organizations from some mandate.

27. See, e.g., State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

28. The California Supreme Court rejected these claims in *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004). In *Catholic Charities*, the California Supreme Court considered whether a nonprofit public benefit corporation associated with the Catholic Church could refuse to cover prescription birth control under its health plan on the basis of the Catholic Church's opposition to the use of birth control. *Id.* at 74–75. The court held that the Women's Contraception Equity Act—which required the employer to cover the costs of the medication—was applied neutrally and generally, did not discriminate against the Catholic Church, and met both the rational-basis and strict-scrutiny constitutional tests. *Id.* at 94–95. The case conflicts with settled authority in at least two respects. First, it fails to recognize that, under the right of church autonomy, government has no power to wrest control of a church's treasury to make it fund, in its own house and within its own workforce, private conduct to which the church is religiously and morally opposed. Second, the court assumes incorrectly that government can classify religious organizations on the basis of which ones are “purely” religious and which are not.

29. Lupu & Tuttle, *supra* note 3, at 1795–6, 1805–19.

30. 494 U.S. 872, 877 (1990). The Court cites approvingly the autonomy line of cases even as it revises the body of law for free exercise claims of individuals.

31. *Id.* at 876–77; see Brady, *supra* note 24, at 1677.

32. See Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 n.3 (1987) (Brennan, J., concurring) (observing that “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community . . . not reducible to a mere aggregation of individuals”).



*Smith* notes these communal aspects of religion and favorably cites precedent dealing with associational rights and the autonomy of churches.<sup>33</sup> Although *Smith* did undo much of the real protection afforded religious individuals, it would be a misreading of this seminal case to ignore the favorable treatment of this precedent, which represents a vindication of an autonomy rule rooted in free exercise.<sup>34</sup>

Other cases misread *Smith's* emphasis on the validity of neutral and generally applicable rules in tandem with *Jones v. Wolf*,<sup>35</sup> which endorsed a "neutral principles" approach to property cases involving churches. Why that reading of *Smith* is wrong is discussed above. Under *Wolf*, when resort to legal documents can answer property questions of title, beneficiary, and ownership, courts are permitted to resort to such documents.<sup>36</sup> However, in my view, this rule applies in property cases in which resort to those documents is routine in other nonreligious contexts. Interpreting a will or a deed is not the same as interpreting the canon law of a church. Moreover, the *Wolf* rule reflects a "peace at any price" philosophy that emphasizes resolving disputes definitively rather than letting them fester in a community. Clarity of ownership and the priority of various property rights add stability to the law and to a community. Knowing that this approach could be applied also encourages churches to anticipate property and other conflicts and to plan for them clearly in the legal documents through which they hold and administer property. On the other hand, courts, though skilled at review of such documents, are required by the Constitution to decline a resolution that depends on interpreting religious doctrine to answer a disputed question. The Supreme Court's decision in *Gonzalez v. Roman Catholic Archbishop of Manila*<sup>37</sup> indicates as much when it held that, although courts have

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33. By referencing the associational aspects of religious expression, the Court expressly acknowledges the broader institutional rights. *Smith*, 494 U.S. at 882 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

34. See also *Brady*, *supra* note 24, at 1677.

35. 443 U.S. 595 (1979). A federal district court, for example, applied neutral principles to a defamation action arising out of religious discipline. See *Klagsbrun v. Va'ad Harabonim*, 53 F. Supp. 2d 732, 738 n.3 (D.N.J. 1999) (applying New Jersey law that relies on *Wolf*).

36. 443 U.S. at 603-04.

37. 280 U.S. 1 (1929).

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the authority to interpret trusts,<sup>38</sup> a trust clause rooted in religious doctrine is beyond the judicial ken.<sup>39</sup>

The *Gonzalez* rule, not the *Wolf* rule, should normally apply in tort litigation involving churches. Certainly courts are familiar with the growth and application of tort rules, but those rules may, in specific cases and for specific claims, lead courts unwittingly (one hopes) into policing the internal affairs of religious organizations, and thus possibly violating the Constitution.<sup>40</sup>

## II. CONSTITUTIONAL INTERSECTIONS

### *A. Finding the Right Defendant*

The discussion of subject matter jurisdiction by the Supreme Court in *Gonzalez* is an important point of departure in defining the ways in which the tort liabilities of religious organizations should be imposed and the criteria by which they are measured. The balance of this commentary notes particular places where the constitutional rights of religious organizations could be infringed through the liability system. It begins in deciding whether the religious entity is a proper defendant. As has been described elsewhere, whether a particular religious entity is properly chargeable is a question of

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38. The Court held, summarily, that it had personal and subject matter jurisdiction. *Gonzalez*, 280 U.S. at 16. The Court also noted, “[t]here is jurisdiction of the subject matter; for the petitioner’s claim is, in substance, that he is entitled to relief sought as the beneficiary of a trust.” *Id.* That the trust property was in the hands of the Archbishop “affects not the jurisdiction of the court, but the terms of the trust.” *Id.* (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714, 729 (1879)).

39. *Gonzalez*, 280 U.S. at 16. The plaintiff’s expert in *Moses v. Diocese of Colorado*, a Lutheran, had no trouble opining on what a reasonable Episcopal bishop should do. 863 P.2d 310, 325–26 (Colo. 1993). It is precisely this sort of judicial conduct that *Gonzalez* precludes. *Jones v. Wolf* notes that resort to documents to resolve a dispute includes more than the deed or the will but could also include the statutes and bylaws of the church, its book of order or internal law, and other documents. If those documents lead to the need to resolve a religious question or interpret religious law, the court is to defer. 443 U.S. at 604 (citing *Serbian Eastern Orthodox Church v. Milivojevich*, 426 U.S. 696 (1976)).

40. For example, the Florida Supreme Court in *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002), uses secular employment rhetoric to describe a negligent hiring claim it applies to a religious entity (*e.g.*, “unsuitability,” “employment”), rather than considering the broader implications of its rule. *Id.* at 361–62; *see also Moses*, 863 P.2d at 320 (citing *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85, 102 (Colo. 1986)).

liability law.<sup>41</sup> Either the defendant did or did not have actual competence over the matter disputed in the lawsuit. Finding this defendant, and excluding those improperly named, is not normally unconstitutional. Only when parties, attempting to increase the likelihood of recovery, seek to force courts to rewrite a church's polity or engage in other judicial excesses is the Constitution implicated.

For example, the Conference of Catholic Bishops has been joined in a lawsuit arising out of the wrongful death of a college-age young adult. Other defendants include the parish where the accident happened and the diocese in which the parish is located.<sup>42</sup> It is alleged that the young man, plaintiff's decedent, consumed alcohol offered by the parish priest, became drunk, and fell to his death when the attic floor on which he walked broke beneath him.<sup>43</sup> On these facts, plaintiffs charge that the defendants knew the priest had served alcohol to persons under twenty-one.<sup>44</sup> All defendants are charged with having fraudulently concealed the priest's conduct (i.e., the improper use of alcohol) allegedly pursuant to a master plan (administered by the Conference) to hide priestly misconduct.<sup>45</sup> In Roman Catholic polity, only a bishop and diocese have responsibility for the supervision of a parish priest; they are the only proper defendants here. No one else, not the parish, not the Conference, not the pope, may exercise daily supervision over him as that term is used in civil discourse.<sup>46</sup> Even if every defendant had knowledge of this priest's behavior, the only defendants empowered to act are the bishop and the diocese. As such, no other defendant can be maintained in the lawsuit for failure to act.<sup>47</sup> Yet, because plaintiff's

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41. Mark Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1100, 1105 (2003) (noting the body charged with liability must possess actual, not merely the potential for, authority over the cause of the dispute).

42. See Amended Complaint, *Gaines v. Krawczyk* (E.D. Pa. 2003) (No. 03-CV-05257).

43. *Id.* ¶¶ 12–19.

44. *Id.*

45. Plaintiffs make the not-so-novel claim that the diocesan bishop is charged with knowledge of his underlings *and* the uniquely novel claim that his “knowledge” may be attributed to the USCCB because he is a corporate member. *Id.* ¶¶ 4, 14–19.

46. See 1983 CODE c.273; NEW COMMENTARY ON THE CODE OF CANON LAW, 344–46 (John P. Beal et al. eds., 2000) (discussing the special obligation of obedience to diocesan bishop); see also *Dewaard v. United Methodist Church*, 793 So. 2d 1038, 1040–41 (Fla. App. 2001) (dismissing a nonsupervising local church).

47. In *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 600–01 (Okla. 1999), the court rejected liability in a national religious body absent some showing that the entity even

counsel believes his likelihood of recovery will increase with more defendants, no defendant will be voluntarily dismissed. In these circumstances, the defendants against whom liability may not lie must expend resources to defend themselves.<sup>48</sup> And to seek a settlement from parties with no legitimate liability is unjust.

In this example, if the plaintiffs persist in their theory that all share in the knowledge available to the dioceses and that together, under a “master plan,” all are liable for any failure of supervision, the court would, in effect, be asked to disregard the structure of the Catholic Church and substitute the plaintiff’s polity (as pleaded in the complaint and memoranda). In my view, that result would offend the Constitution. The case law is clear that churches have the right to organize, administer, and govern themselves according to their own internal law.<sup>49</sup> The courts cannot act in any way to instigate themselves in the polity.<sup>50</sup> The question of constitutionality, however, should not even arise at the outset unless the usual rules of liability and corporate law are disregarded,<sup>51</sup> and the plaintiff’s counsel persists in propounding, and a court adopts, this legal error.

As noted above, religious organizations are not above the law of the state. They have liability exposure for the just debts and damages they create or cause.<sup>52</sup> But the liability is for the debts and damages they directly cause and cannot be compounded by the debts and damages created or caused by *another* religious organization that is ecclesially and civilly separate (unless there is some basis in law or fact for vicarious liability). Having “Catholic” in the name does not make

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knew about the malfeasing minister. The proper supervisor in that polity was the presbytery, not the National Assembly.

48. On November 18, 2004, the district court dismissed the counts of the complaint against the USCCB for failure to state a claim. USCCB had been named only in conspiracy and fraud claims based on the knowledge of the bishop (who is a corporate member as noted in note 45). The central holding of the court was that, under Pennsylvania law, the religious beliefs of the plaintiff’s decedent could not form a fiduciary relationship with a priest (without some express undertaking). Without a legally enforceable special relationship, the civil conspiracy and fraud claims (against all defendants including USCCB) were found without merit.

49. See *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

50. See *Serbian Eastern Orthodox Church v. Milivojevich*, 426 U.S. 696, 709 (1976).

51. See *Chopko*, *supra* note 41, at 1097.

52. See *Chopko*, *Derivative Liability*, in *THE STRUCTURE OF AMERICAN CHURCHES: AN INQUIRY INTO THE IMPACT OF LEGAL STRUCTURES ON RELIGIOUS FREEDOM* (Craig B. Mousin ed., forthcoming 2005).

them all defendants. For example, each Catholic diocese, each Lutheran Synod, each Mahayana temple (and the list could go on) is ecclesially, and thus should be civilly, separate from every other. Misconduct in Boston is not recoverable in Boise.<sup>53</sup> Part of the law under which religious organizations operate presumes that corporate separations will be honored by civil courts even when private litigants plead for a different polity than the one chosen by the church. Imploding a church structure of separate civil entities, absent fraud,<sup>54</sup> because a plaintiff pleads that “they’re all in it together” violates first principles of corporation law. Forcing a religious entity to answer for the torts of another over whom it lacks the civil and ecclesial power to control also violates the Constitution since it results in a court rewriting the polity of a church.<sup>55</sup> Ordinarily, by operation of corporate law, such a result is avoided. If a litigant insists otherwise, he should lose under the Constitution as well. The Constitution forbids the state to organize a Church. That barrier applies *de facto* and *post factum* through tort liability.

### B. Claims Barred

Whether the Constitution precludes the adjudication of a matter *ab initio* or comes into the lawsuit as an affirmative defense at some later stage in the litigation is disputed among practitioners and in the courts. Professors Lupu and Tuttle do not advert to this procedural and substantive matter in their paper. Some courts have ruled that the Constitution bars consideration of a case at the outset and should be dismissed for lack of subject matter jurisdiction.<sup>56</sup> Other courts believe the matter is not barred from the court’s judicial power but might implicate a constitutional matter on which the court should abstain during the trial.<sup>57</sup> I believe the matter is more

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53. For example, in *Presbyterian Church*, 998 P.2d 592, recovery was demanded of all Presbyterian entities and individuals. The harm occurred in Kansas and Oklahoma within two Presbyteries, which were the governance agencies for the polity. *Id.* at 594–97.

54. See *Roman Catholic Archbishop of S.F. v. Superior Court*, 93 Cal. Rptr. 338 (Cal. App. 1971) (no alter ego liability in “Catholic” agencies). Fraud in setting up corporations or in their operation might offer a basis for piercing the corporate veil.

55. Chopko, *supra* note 41, at 1103.

56. See, e.g., *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995), *cert. denied*, 516 U.S. 1116 (1996).

57. *Kelly v. Marcantonio*, 187 F.3d 192, 197, 203 (1st Cir. 1999) (noting the specific issue and holding no preclusive barrier to litigation) (citing *Parella v. Retirement Bd. of the R.I. Employees Ret. Sys.*, 173 F.3d 46 (1st Cir. 1999)).

complex, turning on the ecclesiastical status of the persons bringing the claim, the nature of the claimed action, or both.

In brief, claims brought by ministers to litigate the terms and conditions of their ministry are barred, and courts lack subject matter jurisdiction to entertain such claims under the Constitution. This class of litigation implicates the “ministry exception” described elsewhere.<sup>58</sup>

Such cases—that is, all the claims raised in these cases—should be subject to a motion to dismiss challenging the judicial power of the court to hear them. Where the complaint raises facts that the plaintiff demands to be taken as true for purposes of ruling on a dismissal motion—for example, that the person is not a minister or exercising ministry—a religious organization should still file motions attacking the judicial competence of the court to entertain the suit and support them with affidavits and other evidence disputing the facts.<sup>59</sup> In such a case, the jurisdiction of a court must be decided before the court evaluates the merits of the claims.<sup>60</sup> It is a question of law for the judge, not a question of fact for the jury.<sup>61</sup> The burden of proof is on the one asserting (not disputing) jurisdiction; that is, the plaintiff.<sup>62</sup> The so-called “ministry exception” cases are susceptible to this approach.<sup>63</sup>

Cases brought by church members to adjudicate their ecclesial status (for example, to challenge an excommunication)<sup>64</sup> or contest some aspect of church discipline (for example, public excommunication for sinful behavior)<sup>65</sup> should receive similar treatment. They should be

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58. Lupu & Tuttle, *supra* note 3, at 1804, 1810–13.

59. See *Hiles v. Episcopal Diocese*, 773 N.E.2d 929, 938 (Mass. 2002) (holding that a lower court's acceptance of a plaintiff's allegations as true in ruling on the defendants' motion to dismiss was incorrect and that, because defendants' motion was supported by affidavits, the burden to prove jurisdiction was on the plaintiff).

60. See, e.g., *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558–59 (9th Cir. 1987) (demonstrating that the lower court's acceptance of plaintiff's allegations as true in ruling on defendants' motion to dismiss was incorrect and that the burden to prove jurisdiction was on the plaintiff because defendants' motion was supported by affidavits).

61. *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537–38 (1995).

62. See *Trentacosta*, 813 F.2d at 1559.

63. See *Hiles*, 773 N.E.2d at 938.

64. See, e.g., *O'Conner v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994) (challenging an excommunication).

65. See *Guinn v. Church of Christ of Collinsville*, 775 P.2d 776 (Okla. 1989) (addressing a church's public excommunication for sinful behavior). There are, of course, limits to

dismissed on motion, one that addresses the true nature of the underlying dispute and inability of the civil courts to decide religious questions. These cases reach the very heart of the church autonomy doctrine found in *Watson v. Jones*.<sup>66</sup> When a people agree to be bound together in a religious community, that community is accepted, warts and all. Dissent over doctrine or resentment over practices does not provide a basis for civil litigation.<sup>67</sup>

The last class of cases are brought by nonministers *and* do not involve the adjudication of ecclesial status.<sup>68</sup> These cases include disputes over the misconduct of ministers and the misstep of ecclesiastical leadership. Whether these cases are dismissed on motion or whether the disputes move to consideration of the merits depends—in my view—on the nature of the claims. Lupu and Tuttle have accurately noted that claims for negligent ordination,<sup>69</sup> failure to defrock,<sup>70</sup> clergy malpractice,<sup>71</sup> and most fiduciary duty claims<sup>72</sup> should be barred on constitutional grounds. These claims should be subject to dismissal on motion challenging the subject matter competence of the civil court to hear such a claim.<sup>73</sup>

Claims of fiduciary duty against ministers and churches rooted in religious beliefs and ideations should fail.<sup>74</sup> Fiduciary claims have

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discipline that results in injury. *See Candy H. v. Redemption Ranch, Inc.*, 563 F. Supp. 505 (M.D. Ala. 1983).

66. 80 U.S. (13 Wall.) 679, 727 (1872) (“[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.”).

67. *Id.* at 727–29; *see also* *Roman Catholic Bishop v. Superior Court*, 50 Cal. Rptr. 2d 399, 406 (Ct. App. 1996) (holding that a vow of celibacy is a religious decision that does not create a civil duty).

68. I exclude from analysis the regulatory invasion cases. *See, e.g.*, *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

69. *See Hogan v. Roman Catholic Archbishop of Boston*, No. 02–1296, slip op. at 14 (Mass. Sup. Ct. Feb. 18, 2003), at <http://www.sociallaw.com/superior/supFeb03xx.htm>.

70. *See id.* at 16.

71. *See Chopko, supra* note 41, at 1112 (citing cases).

72. *Id.* at 1119–24.

73. In some instances there may be a religious forum to hear a claimed injury. Or, there are cognizable civil grounds, as described herein.

74. A fiduciary duty may, however, arise between a minister and a congregant in a nonreligious context; for instance, a fiduciary duty can be established by a minister agreeing to look after a trust fund for an aged relative or through specific promises made in counseling. *Cf. Mabus v. St. James Episcopal Church*, No. 2003-CA-00123-SCT, 2004 Miss. LEXIS 1224, at \*21–22.

their origin in the law of trusts.<sup>75</sup> One of the innovations of modern law has been to apply fiduciary duty concepts to certain professional relationships: attorney-client, physician-patient, and psychotherapist-patient. Ordinarily a fiduciary duty case involves an entrustment of money or a professional relationship—in short, some undertaking that the state can constitutionally regulate.<sup>76</sup> Of course, no one argues that the state has any business regulating the relationship between a church and its flock or that it can constitutionally do so.<sup>77</sup> Yet that is exactly what happens when, as in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*,<sup>78</sup> a court imposes fiduciary obligations upon church officers. *Martinelli* is particularly disturbing because, pressed to its logical conclusion, every bishop is a fiduciary of his coreligionists, based on who he is as bishop and not what he does with particular persons—an absurd proposition.<sup>79</sup> Indeed, bishops do not pick the members of their congregation; all are welcome for worship and instruction.<sup>80</sup> Ordinarily it is the other way around; that is, people choose a church and may remain in a church short of conduct grave enough to cause the church affirmatively to excommunicate them, a rare penalty. A bishop cannot personally know and be a fiduciary for each and every member of his diocese based solely on membership and participation in ceremonies.

To this list of claims that should be constitutionally barred, I would add claims of “canonical agency,” denominational liability, and a host of “evil empire” claims, such as RICO. Claims of canonical agency and denominational liability seek to leverage

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75. See RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); BLACK'S LAW DICTIONARY 625–26 (6th ed. 1990) (traditionally resting on entrustment of property to others).

76. For example, property managers, bank officers, executors, and receivers can all be regulated. Secular relationships of trust and confidence such as attorney-client, physician-patient, etc. can also be regulated in their outward manifestations. But an attorney is not regulated in the content of her speech, or because law is special and unique, but because of the express undertaking between two people. While an attorney might be a fiduciary if she undertook an obligation rooted in trust, her law firm would not ordinarily be presumed also to have such a relationship, without more.

77. See Lupu & Tuttle, *supra* note 3, at 1809–10.

78. 196 F.3d 409, 430–31 (2d Cir. 1999).

79. See *id.* at 429.

80. A case that is particularly instructive is *Package v. Holy See*, No. 86-C-222, slip. op. at 6 (N.H. Super. Nov. 30, 1988), in which the pope was alleged to be responsible for a car crash caused by a monk in New Hampshire. The pope did not select the monk for any purpose that could give rise to a duty to third parties. The monk was, for liability purposes with respect to the pope, a congregant. *Id.* The *followers* choose to follow the leader.



church doctrine into a tool for expanding civil damages. For example, “canonical agency” rests on the premise that a cleric is always “on duty” and that no part of his or her time is ever personal. Everything done is in service to the church, and religious superiors are always on the hook for supervision and liability. Such a theory was advanced more than twenty-five years ago in a California case arising out of a traffic accident.<sup>81</sup> The proposition has been rejected by courts as a matter of agency (no agent is always on duty).<sup>82</sup> However, because the theory rests on supposed religious doctrine (where else would the notion of ministry be found), it also violates the Constitution.<sup>83</sup> At a minimum, this theory requires courts to evaluate the degree and depth of religious supervision according to religious, not secular, canons.<sup>84</sup>

Similarly, denominational liability would need to rest on religious doctrine, if at all. For example, in *N.H. v. Presbyterian Church*,<sup>85</sup> plaintiffs claimed every church agency (and member), in concert with the Presbyterian national assembly, was liable for the sexual misconduct of a minister. That minister served in two presbyteries, which were the proper “supervising” entities. The theory that all Presbyterian Church entities were liable for the negligence of one or two regional presbyteries rested on the doctrine of the church’s Book of Order that the actions of one are the actions of all.<sup>86</sup> This phrase, however, is an exhortation to religious solidarity. Plaintiffs

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81. *Stevens v. Roman Catholic Bishop of Fresno*, 123 Cal. Rptr. 171, 175–77 (Cal. Ct. App. 1975).

82. *See* *Ambrosio v. Price*, 495 F. Supp. 381, 384 (D. Neb. 1979) (holding that a church could not be held liable for an accident involving a clergy member because the accident occurred during a personal trip); *Brillhart v. Scheier*, 758 P.2d 219, 221 (Kan. 1988) (holding “that a pastor’s day-to-day activities were within his own discretion and control”).

83. *See* *Roman Catholic Bishop v. Superior Court*, 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996).

84. For example, the NEW COMMENTARY TO THE CODE OF CANON LAW, *supra* note 46, at 346, indicates that bishops lack supervision over clerics on “personal time.” No person is always “on duty” with no “time off.” But to raise the issue means to offer a competing canonical opinion and a court must decide which one is correct, something it constitutionally may not do. *See* *Serbian Eastern Orthodox Church v. Milivojevich*, 426 U.S. 696 (1976).

85. 998 P.2d 592, 597 (Okla. 1999) (the claim rested on a denomination-wide charge); *see supra* note 84.

86. *Petition, Hosey v. Presbyterian Church*, at ¶¶ IV, 3–5; V; I–K (Sept. 30, 1997).

could not constitutionally mutate the phrase to “the negligence of one is the negligence of all.”<sup>87</sup>

Courts here can avoid the constitutional thicket by recognizing and disposing of the extreme liability theory on ordinary grounds—failure to state a claim.<sup>88</sup> A similar result awaits more exotic theories, such as supposed RICO violations because of sexual misconduct. Sexual assault is not an enumerated predicate act necessary for a successful RICO claim.<sup>89</sup> Additionally, a search of the four corners of a religious “enterprise” invariably results in a constitutional problem,<sup>90</sup> for as we know, the Constitution is sometimes violated by “the very process of inquiry.”<sup>91</sup>

### *C. Claims Narrowed*

What happens to claims by nonministers not challenging ecclesial status or predicating liability on some religious duty is a matter of debate. Some jurisdictions bar these claims altogether; some allow them.<sup>92</sup> Sometimes the federal and state courts have reached opposite conclusions about whether the federal Constitution bars particular claims.<sup>93</sup> There is no order in this universe, and the results can

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87. Indeed such a result would impose liability on persons and agencies far removed from the source of the claimed harm, misfeasance by those actually responsible for supervision in that polity. The trial court in *N.H.* disposed of a claim on constitutional grounds. A more wide-ranging critique of assertions of denominational liability is in Mark Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADV. 289, 337–41 (1993).

88. See *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592. An amicus brief of religious entities urged dismissal and noted the more traditional flaws in the pleading. Brief of Amici Curiae of Baptist General Conference et al., *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592 (Okla. 1999) (No. 92953) (dismissed because no allegation of knowledge in defendant church leadership).

89. For example, Professor G. Robert Blakey, of the Notre Dame Law School and the drafter of RICO, has stated that a sexual assault is not a “predicate act.” Robert Blakey, Address at the Boston College Law School Symposium (Apr. 4, 2003) (on file with author); see also *Eckler v. Gen. Council of the Assemblies of God*, 784 S.W.2d 935, 941 (Tex. App. 1990).

90. See *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1139 (D. Mass. 1982) (explaining that courts usually interpret regulatory statutes narrowly to prevent encroachment on free exercise principles).

91. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).

92. Compare *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995), with *Malicki v. Doe*, 814 So. 2d 347, 361 (Fla. 2002).

93. For example, in New York, a lawsuit in the federal courts is barred. See *Ehrens v. Lutheran Church–Missouri Synod*, 269 F. Supp. 2d 328, 332 (S.D.N.Y. 2003), *aff'd*, No. 03-9118, 2004 U.S. App. LEXIS 20568 (2d Cir. Sept. 20, 2004) (per curiam). However, the

sometimes be explained away by the extreme nature of a claim or the means by which the Constitution is necessarily employed as a defense.<sup>94</sup> What seems clear at this point is that extremism in litigation by either party is rarely rewarded, in part for the reasons suggested by Professors Lupu and Tuttle,<sup>95</sup> but more often, I think, because of justice. Absent an ordinary barrier to a claim, such as a statute of limitations, it is counterintuitive for a trial judge to decide a case by a preclusive rule that, in effect, immunizes repeated, criminal behavior.<sup>96</sup> Such a rule would also be difficult to square with constitutional history, which has always provided a means for society to prevent dangerous practices<sup>97</sup> and to protect the public health<sup>98</sup> and the welfare of children<sup>99</sup> from actions rooted in religious teaching. Even the seminal case *Cantwell v. Connecticut*,<sup>100</sup> which incorporated free exercise protections against the states and punished a municipal licensing scheme as a prior restraint, allows room for government to prosecute frauds based on “religion.”<sup>101</sup>

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same types of claims may be maintained in state courts. See *Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992). The same principles apply in Colorado. Compare *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) (holding that allowing plaintiff’s negligent hiring claim would violate the Free Exercise and Establishment Clauses), with *Moses v. Episcopal Dioceses of Colo.*, 863 P.2d 310 (Colo. 1993) (holding that the First Amendment does not bar claims of negligent hiring and supervision against churches). In Rhode Island, the opposite occurs. Compare *Smith v. O’Connell*, 986 F. Supp. 73, 77 (D.R.I. 1997), with *Heroux v. Carpentier*, No. CA PC 92-5807, 1998 WL 388298, at \*9 (R.I. Super. Ct. Jan. 23, 1998).

94. Advocates are sometimes allowed to simply *assert* without the obligation to affirmatively *prove*. Plainly there is a difference between moving to dismiss on constitutional grounds with a memorandum and a “speaking motion” with affidavits and exhibits. *Hiles v. Episcopal Diocese*, 773 N.E.2d 929, 938 (Mass. 2002). In the latter situation, the plaintiff should lose unless she proves, in the same exacting way, why a court may hear the case or the claim. *Bryce v. Episcopal Church in Diocese of Colo.*, 121 F. Supp. 2d 1327, 1334 (D. Colo. 2000), *aff’d*, 289 F.3d 648 (10th Cir. 2002).

95. Lupu & Tuttle, *supra* note 3, at 1855–56, 1857–58.

96. See Scott C. Idleman, *Tort Liability, Religious Entities, and The Decline of Constitutional Protection*, 75 IND. L.J. 219, 245–46 (2000) (noting that state judges were less likely to decide on constitutional principles in favor of a church).

97. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (implying that the government has the power to regulate certain religious practices, such as human sacrifice).

98. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (holding that the government may regulate activity and behavior for the common comfort, health, and prosperity of all).

99. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (noting that the state has an interest in children’s well-being).

100. 310 U.S. 296 (1940).

101. *Id.* at 306.

But *Cantwell* still requires that the conduct pose a “clear and present danger” to a “substantial” interest related to public health, safety, or order before the state is allowed to regulate the individual or entity.<sup>102</sup> A lesser standard could allow for the possibility that the state, through its agencies and courts, would punish and confine religious actors wherever and however it deems necessary.<sup>103</sup> Professors Lupu and Tuttle recognize this danger, for example, in their useful critique of the line of fiduciary duty cases.<sup>104</sup> The reprehensible nature of sex crimes against children and the seeming inaction of religious authorities and others a generation ago are especially ripe targets for judges and juries applying today’s expectations, standards, and law to yesterday’s behavior. The Constitution does not allow the state to punish the church but does allow for principled means to compensate victims for clear injuries.<sup>105</sup>

Professors Lupu and Tuttle wrestle with and reject the more common claims made against religious organizations as difficult to square with the Constitution’s text.<sup>106</sup> My experience with these types of cases and claims validates their ending point. As Professors Lupu and Tuttle decide, ordinary negligence claims offer too much “play in the joints,” permitting excessive judicial action that, in the zeal for compensation, allows recovery by any means, including causes and evidentiary bases that infringe upon the constitutional rule of law. Applying a test approximating the “actual malice” standard of *New York Times Co. v. Sullivan*<sup>107</sup> is a useful way for courts to proceed.<sup>108</sup> Such a process would (a) be based on actual knowledge, not supposition or guesswork; (b) permit recovery in tort for harm caused by repeat offenders; and (c) have a mechanism whereby claims are evaluated by judges, not juries.<sup>109</sup> Each has merit.

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102. *Id.* at 311.

103. *See id.* at 308 (finding that, in the absence of a high barrier, there is a danger a state’s rule will sweep too broadly into religion).

104. Lupu & Tuttle, *supra* note 3, at 1844–45.

105. As such, I consider punitive damages levied against churches to be unconstitutional.

106. *Id.* at 1869–71.

107. 376 U.S. 254, 280 (1964) (holding that a public official, to recover for defamation, must prove actual malice, meaning that the defaming statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not”).

108. Lupu & Tuttle, *supra* note 3, at 1861. In particular, the paper notes a possibility that liability will “require religious entities to restructure themselves to satisfy a state-imposed vision of the ‘good’ or well-ordered religion.” *Id.* at 1834.

109. *Id.* at 1866–67, 1870–71.

The closest comparable standard in current case law is the “intentional failure to supervise” standard of *Gibson v. Brewster*<sup>110</sup> and *Gray v. Ward*<sup>111</sup> in Missouri. This standard is also applied by the Rhode Island state courts<sup>112</sup> and is reflected in an earlier decision in Ohio, *Byrd v. Faber*.<sup>113</sup> While these cases do not set the same standard proposed by Professors Lupu and Tuttle, they are an improvement on the application of ordinary negligence claims.

The constitutional problems with ordinary negligence claims are manifold. For example, negligent supervision traditionally requires a claimant to show that an employer knew, or should have known, of a risk that an employee would cause harm while performing the employer’s work and should have prevented the harm through better supervision. The employer’s standard of care is based on what other “reasonable employers” would, in theory, do when confronted with the same information. These are secular standards based on commercial employment in which what “should be known” is related to a specific set of commercial tasks. Ministry, however, is not secular employment, but the result of a complex theology based on call and vocation.

An illustration of the problematic application of an ordinary negligence claim to a religious organization is the Florida Supreme Court’s recent allowance of negligent hiring and supervision claims based on a very thin legal analysis. The court in *Malicki v. Doe*<sup>114</sup> read constitutional concerns out of the case by stating that free exercise concerns are implicated *only* when the underlying misconduct is based on religious principles. If that were sufficient to dispose of the Free Exercise Clause, there would be no such thing as

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110. 952 S.W.2d 239, 248 (Mo. 1997) (holding that “a cause of action for intentional failure to supervise clergy is stated if (1) a supervisor (or supervisors) exists, (2) the supervisor (or supervisors) knew that harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the supervisor’s inaction caused damage, and (5) the other requirements of the Restatement (Second) of Torts, section 317 are met”).

111. 950 S.W.2d 232, 234 (Mo. 1997) (holding that the trial court erred in dismissing a petitioner’s claim of intentional failure to supervise clergy).

112. *See, e.g.*, *Heroux v. Carpentier*, No. CA PC 92-5807, 1998 WL 388298, at \*10 (R.I. Super. Ct. Jan. 23, 1998).

113. *Byrd v. Faber* requires detailed pleading of the factual basis on which the tort claim against a church rests. 565 N.E.2d 584, 587 (Ohio 1991). This rule displaces the ordinary notice pleading in which parties might guess what discovery might bring.

114. 814 So. 2d 347, 360–61 (Fla. 2002).

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a ministerial exception.<sup>115</sup> Additionally, the court misses the point. The question is not, as the court thought, whether the individual wrongdoer can be charged with a crime or a tort, but whether a religious institution, and its hierarchy, is civilly responsible for such wrongdoing. These are separate questions when liability is based on fault.<sup>116</sup>

As Professors Lupu and Tuttle correctly point out, the question of whether the institution is liable invariably raises questions about allocations of responsibility within a religious organization.<sup>117</sup> Such ecclesial questions may not be answered in precisely the same way from one religious denomination to another. Plainly, the answer may also be very different from that of a secular employer.<sup>118</sup> Universal application of a liability principle only to hierarchical churches exempts congregational churches, and this facially implicates antiestablishment principles. Universal application of secular norms violates free exercise–church autonomy principles.

Moreover, under the “should have known” part of the equation, how information “should be known” is itself problematic. In one case, a plaintiff claimed that he repeatedly confessed his violation by his priest to other priests, and that these actions constituted knowledge in the defendant bishop and diocese, notwithstanding that confession is sacramentally secret and confessors may not divulge what is heard.<sup>119</sup> When information is private, personal or pastoral, one would dispute whether this information is available to the institution<sup>120</sup> and what its probative value is. Sending this dispute to a jury, however, would seem to provoke recovery unless the evidence presented by the institution was overwhelming. Recovery in

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115. Most, if not all, of the ministry exception cases involve alleged discrimination at odds with the teaching of the religious body. Consistency with doctrine is not the key to these cases, but the level of state interference in a religious function is. *See, e.g.*, *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000).

116. Nonetheless, *Malicki*, 814 So. 2d 347, 361, and its companion *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002), routinely conflate the categories in reaching for a result.

117. Lupu & Tuttle, *supra* note 3, at 1883–84.

118. *See Swanson v. Roman Catholic Bishop*, 692 A.2d 441, 444–45 (Me. 1997).

119. *See Koenig v. Lambert*, 527 N.W.2d 903, 906 (S.D. 1995) (holding that, since the plaintiff claimed he confessed his abuse to seventeen priests, there was “material fact” about diocesan knowledge). *Cf.* NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 46, at 983.

120. *See, e.g.*, *Rivers v. Poisson*, 761 A.2d 232, 235–36 (R.I. 2000); *Osborne v. Payne*, 31 S.W.3d 911 (Ky. 2000).

tort in such cases is allowed, but the prospect of abusive or multiple recoveries should be mitigated. Professors Lupu and Tuttle's judge-only system avoids the possibility of jury bias.<sup>121</sup>

In other cases, "should have known" plainly means "should have anticipated"; for example, a court has held that a nursery volunteer *might* have been a victim of abuse and therefore *might* have abused.<sup>122</sup> In other instances, the evidence of "should have known" seems an indictment of the inadequacy of the religious system of pastoral clergy, or their selection and training.<sup>123</sup> In such cases, how the religious organization or its insurer "should have known" is not clear.

The result in *Gibson*,<sup>124</sup> like the test advocated by Lupu and Tuttle, mitigates these difficulties. There is no liability without antecedent knowledge (not guesswork or hindsight).<sup>125</sup> Such knowledge must be directly related to the work or service of the minister and the negligence charged.<sup>126</sup> A religious "employer" could ignore that knowledge at its peril, and in such clear cases, a failure to remove an abusive cleric is difficult to explain or justify.<sup>127</sup>

I would not, however, extend this area of law to other claims sounding in "employment."<sup>128</sup> First, such an extension would seem

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121. The possibility of jury bias is compounded in liability regimes in which juries can decide the extent to which a perpetrator's actions were personal or employer-motivated. Lupu & Tuttle, *supra* note 3, at 1855; *see also* Fearing v. Bucher, 977 P.2d 1163, 1166-67 (Or. 1999). In other instances, such as in regulation for example, the state is barred from deciding such questions based on the degree of "religiosity." *Compare* NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979), *with* Montrose Christian Schools Corp. v. Walsh, 770 A.2d 111, 128-29 (Md. 2001).

122. *See* Broderick v. King's Way Assembly of God Church, 808 P.2d 1211 (Alaska 1991) (noting that the center failed to ask a volunteer whether she was ever abused).

123. *See* Schiltz, *supra* note 17, at 960, 967-69.

124. 952 S.W.2d 239 (Mo. 1997).

125. *See id.* at 248.

126. Consider, for example, the cases cited in Schiltz, *supra* note 17, at 960-62, and in Chopko, *supra* note 41, at 1117 n.112.

127. It is quite a different situation when a minister is involved as the alleged tortfeasor, than when the alleged guilty party is a congregant who is only worshipping in a community. Some cases have asserted negligent supervision claims against churches when one congregant assaults another, based on an asserted "should have known" standard. To assert a congregation must supervise congregants for all potential dangers would revolutionize the law and pervert religion. No more "All Are Welcome" signs in front of churches. They would be replaced with membership forms laden with background information questions and a release. Such a development would be dangerous for the law of torts by mutating employment law into a custodial form of liability law, and a sad day for churches.

128. *Contra* Lupu & Tuttle, *supra* note 3, at 1866.

to be duplicative. A court that provides one avenue of recovery, in my view, provides the only avenue a claimant needs. A jury system allowing multiple torts (on the same facts) as the basis for a verdict allows the same conduct to be punished several times. A colorable claim of abuse, responded to with proper compensation, is an adequate remedy for a victim. Second, claims like negligent hiring and negligent retention invariably ignore that the task being “hired” for is ministry.<sup>129</sup> *Malicki*, for example, allowed a negligent hiring claim based on whether what was known or should be known renders a person unsuitable for employment.<sup>130</sup> However, in these cases, “employment” is ministry and a person’s suitability for ministry is a religious question. One cannot make a decision about a person’s suitability for employment without also making decisions about the nature of the employment. Similar arguments could be made with respect to “retention” claims.<sup>131</sup> Such claims could and should be barred and subject to a motion to dismiss.

Supervision claims are not necessarily so easily disposed of. The Constitution is implicated in the evidence, the knowledge, and “the very process of inquiry.”<sup>132</sup> Raising the bar from negligence to intention or, as Professors Lupu and Tuttle suggest, from torts to constitutional defamation, avoids most, if not all, the constitutional problems of other approaches. It also avoids the injustice of seeming to immunize repeated criminal behavior or institutional misfeasance against recovery. No person is beyond the law. Neither are religious organizations.

#### IV. CONCLUSION

Religious institutions are in a real bind. On the one hand, a failure to remove those who injure children has created the risk of liability for the failure to act. On the other hand, the vagaries of the liability system, built on secular employment models and on secular reasonable business standards, are not accommodating to religious systems. Tort liability essentially regulates the conduct of business by

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129. See *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791, 794 (N.Y. Sup. Ct. 1997). Additionally, for the myriad of claims amassed by plaintiffs, see *Hogan v. Roman Catholic Archbishop of Boston*, No. 02-1296, slip op. at 14 (Mass. Sup. Ct. Feb. 18, 2003), at <http://www.sociallaw.com/superior/supFeb03xx.htm>.

130. *Malicki v. Doe*, 814 So. 2d 347, 360–62 (2002).

131. See *Chopko*, *supra* note 41, at 1116.

132. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).



the financial disincentive of large liability awards; however, it is not the role of the state to force similar changes to religious behavior inside religious institutions, absent exigent circumstances. These circumstances, such as when there is a clear and present danger to a substantial state interest, warrant a different result.

No one would argue that a state cannot award damages for physical abuse even if carried out in pursuit of religious teaching.<sup>133</sup> Few should complain when the liability system compensates individuals injured by the repeated criminal misconduct of clergy, especially when that behavior is in fact known to leaders who were in a position to stop it. But the test is intentionality, not negligence. In these circumstances, the Constitution would not normally bar a court from jurisdiction to hear a case setting forth such intentional acts.

The same cannot be said about other kinds of tort recovery. Actions based on fiduciary duty or negligent hiring and retention, like claims for clergy misconduct, all invite the courts to pretend they are not policing relationships inside religious bodies while doing just that. If the state may not define in advance what kinds of relations religious leaders must have with clergy, or the relations religious people must have with their churches, the state cannot define these matters after the fact through the tort system.

Finally, churches need the freedom to be churches. They do best when they have the freedom to heal the injuries caused by their ministers. But they must do so consistent with their primary responsibility to the worshipping community and those in need. The destruction of a church through the tort system is no answer. Neither is the loss of religious freedom through fear of liability. Churches are obliged to continue their works while healing the people.

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133. *See, e.g.*, *Candy H. v. Redemption Ranch Inc.*, 563 F. Supp. 505, 511 (M.D. Ala. 1983).