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Cheryl B. Preston

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An Itty-Bitty Immunity and Its Consequences for The Church of Jesus Christ of Latter-day Saints: A Response to Professors Lupu and Tuttle

*Cheryl B. Preston**

I. INTRODUCTION

The confluence of religion and sexual abuse has become a matter of substantial debate. Everyone agrees that sexual abuse by a member of the clergy is wrong. The arguments erupt when we begin to tease out when sex is abusive and what to do about it, particularly what the law should do about it. For those committed to the preservation of religious autonomy in the United States, the unfettered tort liability of religious institutions is not a comfortable prospect, although the train seems to have left the station headed in that direction.¹ Finding a compromise between using social and state authority to address the admitted evil of the abuse of power—particularly as it rains down primarily on women and children—and preserving of religious freedom is a daunting task.

Professors Ira C. Lupu and Robert W. Tuttle's paper, *Sexual Misconduct and Ecclesiastical Immunity*,² effectively traces the history and status of the ecclesiastical immunity doctrine and then attempts

* Professor of Law, J. Reuben Clark Law School, Brigham Young University. I thank Addy Squires, Maria Miles, Sarah Mumford, and Jill Rencher for their excellent research, editing, and ideas, and my colleagues Cliff Fleming, Jim Gordon, Fred Gedicks, and Kif Augustine-Adams, as well as Von Keetch, for wise and useful comments on earlier drafts. I also thank Professors Lupu and Tuttle for writing such a thorough, thought-provoking article for me to study and discuss.

1. Professors Lupu and Tuttle observe that “the past several decades have witnessed a quite remarkable trend away from recognition of First Amendment defenses and a judicial willingness to impose liability upon clergy—and their supervisors—at least as broad as the liability imposed upon analogous secular enterprises.” Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1794 (presented at the 2004 Church Autonomy Conference, Feb. 7, 2004, sponsored by the J. Reuben Clark Law School and the International Center for Law and Religion Studies); *see also id.* at 1804–05 (“[R]eligion-distinctive tort immunities have been disappearing, and they will continue to vanish to the point of extinction.”); *id.* at 1796 (“erosion of charitable immunity”); *id.* at 1798 (“dramatically increased [] exposure of religious organizations to liability”).

2. *Id.* at 1789.

to provide a framework for understanding a widely divergent and inconsistent body of case law arising from claims of sexual abuse by clergy. They categorize cases by their doctrinal premises, providing a basis for a clearer and more consistent understanding of existing law.

Professors Lupu and Tuttle then provide a normative argument for preserving some form of ecclesiastical immunity from the onslaught of unrestricted tort liability,³ but only in “highly particularized legal contexts.”⁴ Professors Lupu and Tuttle assert that the free exercise approach to ecclesiastical immunity is a dead end.⁵ They resort instead to the Establishment Clause and the notion that with Separationism “government is constitutionally disabled from addressing or asserting control over ultimate questions.”⁶ Based on this principle, they propose, first, to shield the individual priest/perpetrator when the abuse involves an adult victim, is not a crime, and does not arise during a secular⁷ or secular-like⁸ counseling relationship.

With respect to individual liability, Professors Lupu and Tuttle argue that, when claims reach beyond offending clergymen⁹ to the sponsoring organization, such claims “cannot help but touch the institutional arrangements and theological understandings that inform the structure of faith communities and their leadership,”¹⁰ since churches will feel the pressure to “internalize state-imposed changes in organizational structure”¹¹ and will ultimately be forced to “rearrange[] . . . structure, policy or practice.”¹² Professors Lupu and Tuttle then offer suggestions for the protection of churches and supervisors, including primarily a proposal to limit liability for negligent hiring, training, and supervising to cases in which the

3. *Id.* at 1795–96.

4. *Id.* at 1896.

5. *See id.* at 1816.

6. *Id.* at 1796.

7. *See id.* at 1828.

8. *See id.* at 1831 (citing *McCracken v. Walls-Kaufman*, 717 A.2d 346, 353 (D.C. 1998) (affirming liability when relationship included “giving counsel or advice . . . similar to that usually given by psychologists or psychologists [sic]”)).

9. Professors Lupu and Tuttle use the term “clergyman” because the vast majority of the perpetrators of sexual abuse are men. *Id.* at 1817 n.104. I use interchangeably terms from various religious traditions, including priest, minister, pastor, bishop, cleric, and so forth.

10. *Id.* at 1817.

11. *Id.* at 1841.

12. *Id.* at 1845.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

defendant had “actual malice,” as that standard has developed in the freedom of the press cases.¹³

I ally myself with Professors Lupu and Tuttle on many fronts. I am sympathetic to the concerns raised in *Sexual Misconduct* regarding the risks to churches, and I endorse Professors Lupu and Tuttle’s stated objective of finding “an optimal legal arrangement [that will] balance the concerns of the tort system . . . on one hand, with the constitutional concerns regarding structural autonomy of religious institutions, on the other.”¹⁴ I also accept, for purposes of this Article, Professors Lupu and Tuttle’s position that the Establishment Clause, for the reasons given in *Sexual Misconduct*, provides doctrinal support for at least some protections to religious organizations from the consequences of tort liability. I assume, for purposes of this response, that adult victims¹⁵ are almost exclusively female.¹⁶ Finally, I accept Professors Lupu and Tuttle’s notion that standards drawn from the law of libel can provide a structure for reconciling tort law and the constitutional interests of religions in the

13. *Id.* at 1861.

14. *Id.* at 1795.

15. For the proposition that the standards for children and adult victims should be the same, see Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 47 n.9 (2001).

16. In studies of clergy sexual abuse, there is little to no discussion of abuse against males as adults. “Gary Schoener, a Minneapolis psychologist with experience in more than 2,000 clergy sexual abuse cases, says he has seen six times more teenage and adult female victims as compared to boys.” Tamara Turner, Don’t Blame Gays for Catholic Church Scandal, *at* <http://www.socialism.com/currents/CatholicChurch.html> (June 19, 2002). Although Schoener specifically address adult female victims as well as teenage female victims, with respect to male victims, only abuse of minors is mentioned. *Id.* What is more,

[t]herapist and ex-priest A.W. Richard Sipes has also found that predatory priests mostly target females, primarily adult women. But he believes most child and teenage victims are male, probably because of the church’s sex segregation policy. He feels strongly this is due to opportunity, not sexual orientation, comparing it to sex between heterosexual men in prison.

Id. Although there are cases of male adults being sexually abused, these cases involve violence in prison or domestic abuse. *See also* Paul J. Isely & David Gehrenbeck-Shim, *Sexual Assault of Men in the Community*, 25 J. COMMUNITY PSYCHOL. 159, 161 (1997), *available at* <http://www3.interscience.wiley.com/cgi-bin/fulltext/46090/PDFSTART>. This kind of violence does not coincide with the usually more coercive and persuasive sexual touching by clergy in a pastoral setting. Moreover, in the Isely & Gehrenbeck-Shim study, there were no reports of sexual assaults against male adults taking place at a church or religious institution or of the perpetrator being a clergyman. *Id.* at 163. Clergy abuse against males occurs primarily in boys because “[c]hildren are easier to intimidate than adults and not as likely to be believed.” Turner, *supra*. *See generally* Lana Stermac et al., *Sexual Assault of Adult Males*, 11 J. INTERPERSONAL VIOLENCE, 52 (1996).

context of liability for the wrongful hiring, training, and supervising of clergy.¹⁷

Beyond these points of consensus, however, I fear that the “legal arrangement”¹⁸ offered by Professors Lupu and Tuttle provides an insufficient account of the “distinctive constitutional place of religious institutions.”¹⁹ The pressures of changing cultural norms,²⁰ heightened awareness of sexual exploitation and power imbalances,²¹ declining reputations of religious institutions generally (magnified by the recent clergy abuse scandals),²² eroded legal immunities,²³ and expanding tort theories are pushing courts toward unrestricted assessments of liability against clergy and churches. An account of constitutional exceptionality rugged enough to withstand this pressure must be concrete and based on defensible distinctions. Similar to the concern of Angela Carmella,²⁴ I fear that fuzzy conceptions of constitutional immunity will not only “fail but will poison the well in ways that render courts deeply resistant to more reasonable assertions of ecclesiastical immunity.”²⁵

In this response, I argue that Professors Lupu and Tuttle’s normative vision, although a positive step in the right direction, ultimately is insufficient. It covers too few cases, is in some particulars too vague, relies on a few distinctions that are too slippery or are not convincing, and underestimates the risk of the causes of action that remain after applying their suggested cautions. Thus, their proposal falls short of their stated objective to reach “a well-reasoned account of the distinctive constitutional place of religious institutions.”²⁶

In Part II.A of this Article, I consider the categories of protection and nonprotection drawn by Professors Lupu and Tuttle. I address the narrow and relatively rare category of cases for which

17. Lupu & Tuttle, *supra* note 1, at 1795.

18. *Id.*

19. *Id.*

20. *See id.* at 1798.

21. *See id.* at 1800.

22. *See id.* at 1798.

23. *See id.* at 1794.

24. *See* Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1054–55 (2003).

25. Lupu & Tuttle, *supra* note 1, at 1817.

26. *Id.* at 1795.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

Professors Lupu and Tuttle make a normative argument for constitutional protection. Then I note the limited and vague nature of most of the constitutional immunities suggested by Professors Lupu and Tuttle.

In Part II.B, I argue first that some of the lines Professors Lupu and Tuttle draw dividing the kind of counseling cases that warrant constitutional considerations from those that do not are tenuous and problematic. In addition, the comparisons they draw between clergy and financial fiduciaries are contestable. I then suggest that Professors Lupu and Tuttle perhaps underestimate the risks posed by expansive interpretations of institutional fiduciary duty and vicarious liability. The end result is that, with the notable exception of supervisory torts, Professors Lupu and Tuttle do little to strike a balance between the demands of tort law and the constitutional distinctiveness of religion.

In Part III, I apply the normative rules suggested by Professors Lupu and Tuttle in the context of claims against The Church of Jesus Christ of Latter-day Saints (“the Church”) and its priesthood leaders. By applying their analysis in a concrete context, we can better understand the permutations of the problem and the scope of the solutions. Although Professors Lupu and Tuttle’s proposal provides some useful guidelines as applied to the Church, the line between professional and nonprofessional counseling collapses, and with it the shield of immunity that should be available to protect Latter-day Saint clergy. But in other respects, an application of their proposal to the Church affirms the concerns raised by Professors Lupu and Tuttle and illustrates some benefits of their proposal.

II. PROFESSORS LUPU AND TUTTLE’S SWATH OF PROTECTION

A. The Narrow Slice of Protection

In this section, I delineate the categories of cases in which Professors Lupu and Tuttle concede that there should be no religious immunity and then show these categories to be so broad that they leave only a few kinds of cases where clergy and churches benefit from immunity under Professors Lupu and Tuttle’s normative scheme. In addition, I argue that the kinds of protections offered by Professors Lupu and Tuttle are in some respects no more than vague cautions.

1. Liability of individual perpetrators

Professors Lupu and Tuttle agree with the imposition of civil liability on individual clergymen for sexual abuse against children and those “who lack capacity to consent,”²⁷ and with the imposition of criminal liability for any abuse that fits within a criminal statute.²⁸ By excluding from protection clergy who are charged with abusing children, Professors Lupu and Tuttle limit their Establishment Clause protections to a small percentage of cases—those involving female adult victims. Professors Lupu and Tuttle acknowledge that “cases in which an adult is the victim have received less public attention than those involving children.”²⁹ Certainly, part of the reason for that is their relative rarity. The reported cases and available quantitative data suggest that the majority of victims are under age eighteen.³⁰ For instance, the recently released report issued by the United States Conference of Catholic Bishops refers to nearly 11,000 sexual abuse claims between 1950 and 2002, and none of this vast number involved adult victims.³¹ Similarly, a comprehensive Web page lists the allegations of sexual abuse brought against clergy of the Catholic Church in the United States.³² Of the 252 cases in which the victim’s age is given, only fourteen of the victims were adults.³³ On another Web site,³⁴ all but 44 of 517 allegations of

27. Lupu & Tuttle, *supra* note 1, at 1797.

28. *See id.* at 1819.

29. *Id.* at 1794.

30. In contrast, Patrick Schiltz, who has represented or advised religious organizations in connection with over 500 clergy sexual misconduct cases, representing almost every major Christian denomination in the U.S., disagrees that the victims are mostly children. Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 949 (2003). He reports that, in the cases he worked on, the most common allegation was a sexual affair with a female adult. *Id.* at 967; *see also id.* at 950 n.1 (claiming that with non-Catholic pastors the victims are “overwhelmingly female”).

31. *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 70 (2004), at <http://www.usccb.org/nrb/johnjaystudy/index.htm> (last visited Dec. 2, 2004). According to the report, approximately 77% of victims were ages 11–17, 17% were ages 8–10, and about 6% were age 7 or younger. *Id.*

32. *See* Catholics for a Free Choice, Sexual Abuse and Misconduct in the Catholic Church; Selected Cases from Media Reports Through 2002, at <http://www.catholicsforchoice.org/international/SexAbuseChart.htm> (last visited Dec. 2, 2004).

33. *Id.* Fourteen were females between age fifteen and eighteen.

34. *See* The Complete List, at www.reformation.com (last visited Dec. 2, 2004).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

abuse by leaders³⁵ of various religions in the United States involved victims under age eighteen.³⁶

If churches are liable under fiduciary duty, supervisory torts, or respondeat superior, in the many cases involving children, churches will feel pressure to “internalize state-imposed changes in organizational structure”³⁷ and will ultimately be forced to “rearrange[] . . . structure, policy or practice,”³⁸ as Professors Lupu and Tuttle fear, even if they were to be fully shielded in cases involving adult victims. While even a single betrayal of an adult woman or one unconstitutional invasion of religious autonomy is too many, the judicial pressure from cases involving minors will influence churches’ choices so monumentally that the results in the few cases involving adult victims will be rendered relatively insignificant. Finding the appropriate immunity in the adult cases may be an admirable goal; however, this project needs to be understood against the sheer weight of cases involving victims under age eighteen.

In a further restriction of scope, Professors Lupu and Tuttle also condone the imposition of liability against individual clergymen who commit sexual abuse while acting as professional counselors in a secular sense³⁹ or in “circumstances functionally identical to secular counseling.”⁴⁰ I argue later that their distinction between secular counseling and other counseling is contestable; however, even if Professors Lupu and Tuttle’s definitions shield spiritual counseling, that exclusion is relatively insignificant. Professors Lupu and Tuttle admit that the “vast majority of cases of clergy sexual misconduct with adult victims . . . arise from counseling relationships” that

35. *Id.* The survey listed 838 total allegations of sexual misconduct by protestant clergy. Of those, 147 of the accused clerics are listed as Baptist, 251 as “Bible Church” (evangelical/fundamentalist), 140 as Anglican/Episcopalian, 38 as Lutheran, 46 as Methodist, 19 as Presbyterian, and 197 as “various religions.” *Id.* Within the “various” category, sixteen of the accused are identified as affiliated with The Church of Jesus Christ of Latter-day Saints, two of which are identified in leadership positions in the Church, five of which held ancillary lay positions such as clerk or sunday school teacher, and nine of which are merely members or previous members of the Church. *See id.*

36. *See id.* Forty-four of the cases involved female victims over age eighteen, and 114 of the cases involved female teenagers. *See id.* In contrast, Patrick Schiltz disagrees that the victims are mostly children. *See supra* note 30.

37. Lupu & Tuttle, *supra* note 1, at 1841.

38. *Id.* at 1845.

39. *See id.* at 1821.

40. *Id.* at 1832.

involve secular matters.⁴¹ For instance, a 1988–89 study of sixty-two civil suits against ministers and their churches for sexual abuse revealed that all of the cases involving adult victims arose in counseling relationships that dealt with matters typically handled by secular therapists.⁴² Because Professors Lupu and Tuttle concede liability in adult therapeutic counseling cases, none of these defendants would benefit from any kind of ecclesiastical immunity under the limited scheme proposed by Professors Lupu and Tuttle.

Moreover, Professors Lupu and Tuttle do not, in fact, provide for immunity in every adult abuse case arising in nonsecular counseling.⁴³ “[W]e do not conclude that sex between a cleric and his congregant is actionable only if the cleric is engaged in the practice of secular therapeutic counseling.”⁴⁴ In this category of case, Professors Lupu and Tuttle do suggest that courts be “reticent” to impose liability⁴⁵ and “that judicial assessment . . . requires heightened sensitivity to the constitutional problems inherent in such adjudications.”⁴⁶ But other than these vague cautions, Professors Lupu and Tuttle offer a shield of immunity for only a tiny slice of potential cases—those involving adult victims whose abuse did not occur in any remotely secular-comparable setting or as a result of criminal acts.

2. *Liability of supervisors and religious institutions*

With regard to nonperpetrator supervisors and churches as entities, Professors Lupu and Tuttle address three types of liability—institutional fiduciary duty, supervisory torts, and respondeat superior. With respect to liability based on the institutional fiduciary duty owed by the supervisor or the church directly to the victim,⁴⁷ Professors Lupu and Tuttle suggest a variety of doctrinal failings and policies weighing against this form of action, but acknowledge that “some prominent courts have begun to expand the fiduciary

41. *Id.* at 1828.

42. *See Studies Show Depth of Scandal in Churches*, FREETHOUGHT TODAY, May 1990, at 12, available at <http://www.ffrf.org/timely/epidstudy.php> (last visited Dec. 2, 2004).

43. *See* Lupu & Tuttle, *supra* note 1, at 1830–31.

44. *Id.*

45. *Id.* at 1829–31.

46. *Id.* at 1834.

47. *Id.*

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

obligations of religious organizations and their spokespersons.”⁴⁸ However, rather than attempting to articulate a concrete basis for asserting immunity to counteract this “trend,”⁴⁹ Professors Lupu and Tuttle caution that, to the extent courts use fiduciary duty, they “must craft legally imposed duties in constitutionally sensitive ways,”⁵⁰ avoid using “religious character alone to trigger the imposition of duties,”⁵¹ and clarify with “jury instructions . . . carefully framed” to “warn against relying on an institution’s religious character alone.”⁵² These are wise admonitions but provide little concrete guidance to a court looking for a practical theory of ecclesiastical immunity.

The second type of action discussed by Professors Lupu and Tuttle is negligent hiring, training, and supervising. Although courts have not allowed claims for negligent ordination to this point,⁵³ some allow claims for negligent employment arguing that this has a clear secular parallel.⁵⁴ For this category of cases, Professors Lupu and Tuttle make a creative and powerful suggestion of an “alternative approach” between no immunity and absolute immunity for churches.⁵⁵ They suggest that churches and supervisors be liable for negligent employment only if they have actual knowledge of or a reckless disregard for the improper sexual proclivities of a clergyman.⁵⁶ Professors Lupu and Tuttle take this knowledge test from the “actual malice” standard used in freedom of the press cases.⁵⁷ Further, they urge the adoption of procedural cautions, also taken from the free press cases, such as requiring clear and convincing evidence of actual malice,⁵⁸ having judges assume

48. *Id.* at 1836.

49. *Id.*

50. *Id.* at 1834.

51. *Id.* at 1844.

52. *Id.*

53. *See id.* at 1846.

54. *See id.* at 147–48.

55. *Id.* at 1858–79.

56. *See id.* at 1795.

57. *Id.* at 1860 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964) (defining actual malice as “with knowledge that it was false or with reckless disregard of whether it was false or not”), and its progeny, *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Hustler v. Falwell*, 485 U.S. 46 (1988) (allowing the press the freedom to perform duties without undue inhibition from risks of liability)).

58. *See id.* at 1872.

extraordinary control over juries,⁵⁹ and limiting evidence of church internal organization to written documents that can be interpreted in secular terms.⁶⁰ Professors Lupu and Tuttle then acknowledge that even this approach may be inadequate in both a constitutional sense and a practical sense.⁶¹

Professors Lupu and Tuttle last address respondeat superior or vicarious liability.⁶² They conclude that, if a court does find the abuse within the scope of agency using only neutral principles, then “expansive interpretation of [the vicarious liability] test does not raise special constitutional problems when applied to religious organizations.”⁶³ Because under Professors Lupu and Tuttle’s analysis tort claims for abuse against children are allowed,⁶⁴ liability in respondeat superior could thus follow for the organization in all such cases. Further, if it cannot be proved that the perpetrator’s counseling was purely spiritual, then many more cases may also lead directly to liability in respondeat superior for the organization. Thus, even if the other two bases for organization liability—breach of fiduciary duty and negligent hiring, training, and supervising—are not available, respondeat superior presents the possibility of obtaining a judgment against a church as an organization much of the time. Further, Professors Lupu and Tuttle do not suggest any specific procedural or substantive protections or applications of ecclesiastical immunity to avoid unconstitutional intrusion in cases where courts apply broader interpretations of vicarious liability.

3. *The limits of protection*

Taken together, the kinds of tort cases for which Professors Lupu and Tuttle offer some constitutional protection—other than merely urging constitutional “sensitivity”—seem to be limited to two kinds of cases. First, immunity is available in cases against individual perpetrators involving adult victims who were abused in a circumstance other than that of a professional (or comparable) counseling setting, such as purely spiritual counseling, and who were

59. *See id.* at 1872–73.

60. *See id.* at 1876–78.

61. *See id.* at 1878–79.

62. *See id.* at 1879–84.

63. *Id.* at 1882.

64. *See id.* at 1797.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

not victims of criminal sexual acts. Second, immunity is available in cases against religious institutions or supervisors alleging negligent supervision, as long as there is no evidence that the defendant had actual knowledge of, or a reckless disregard for, the perpetrator's propensities for sexual abuse. Thus, in terms of percentage of cases, Professors Lupu and Tuttle provide little overall protection for clergy and churches. Further, Professors Lupu and Tuttle offer a hearty scheme of immunity only in the negligent supervision context, leaving two other causes of action—fiduciary duty and vicarious liability—largely available, through which a plaintiff may obtain the same result. Their proposed immunity, finally, relies too much on vague cautions about the need for courts to have constitutional sensitivity.⁶⁵

B. Difficulties with Professors Lupu and Tuttle's Distinctions

In the preceding section, I focused on the limited nature of the liability protections that Professors Lupu and Tuttle would provide to clergy and churches. In this section, I argue further that the distinctions upon which the limited exclusions rely are contestable. I then conclude that, because of the fluidity of the standards, even fewer cases than indicated in the above section are in fact protected under Professors Lupu and Tuttle's analysis. Moreover, the immunity offered by Professors Lupu and Tuttle is further strained by the risks of expanding judicial interpretations in the areas of institutional fiduciary duty and vicarious liability.

65. See, e.g., Lupu & Tuttle, *supra* note 1, at 1797 (“[A]djudication of wrongful acts in the hiring and supervision of clergy must be conducted with sensitivity to constitutional concerns”); *id.* at 1819 (“[C]riminal investigations of, and plea negotiations with, religious entities must be conducted with constitutional sensitivity to limits on the state’s role in the selection and retention of clergy.”); *id.* at 1831 (“[J]udicial assessment of sexual relationships between clergy and parishioners requires heightened sensitivity to the constitutional problems inherent in such adjudications”); *id.* at 1834 (“[C]ourts must craft legally imposed duties in constitutionally sensitive ways”); *id.* at 1847 (“[O]ther, more constitutionally sensitive and precisely focused theories of relief can address the harms about which the state has a legitimate concern”); *id.* at 1870 (“[A]djudication of [certain] claims [must] be accompanied by constitutionally sensitive methods of deciding who within a religious organization had authority to act in the requisite ways”); *id.* at 1878 (“[C]ourts may demonstrate the requisite sensitivity to [various issues].”); *id.* at 1871 (“[In certain contexts] the reconsidered neutral principles doctrine would thus permit judges to make the most constitutionally sensitive determinations on a motion for summary judgment.”).

1. The fuzziness of the distinctions with regard to the liability of individual perpetrators

a. Distinction between adults and children. Professors Lupu and Tuttle initially distinguish cases involving minors, arguing that the “public interest in protecting children vastly outweighs any claim of religious privilege; and . . . adjudication of the sexual abuse of children can proceed without state intrusion into questions of religious doctrine or governance.”⁶⁶ With Professors Lupu and Tuttle, I find the first assertion persuasive, although I am not sure that every court would, as they say, “emphatically” agree.⁶⁷ There are certainly those who would argue that the preservation of religion from government intrusion is the highest public interest.

The second assertion—“adjudication of the sexual abuse of children can proceed without state intrusion into questions of religious doctrine or governance”⁶⁸—is more problematic. The extent of state intrusion in child victim cases is less than in adult victim cases only in the sense that it is not necessary to look at the particulars of the relationship between the child and adult to establish the basis of a perpetrator’s liability. Maintaining sexual relations with a minor in the absence of marriage is a crime.⁶⁹ If a civil action is pursued against a perpetrator, the question of consent is generally negated by age,⁷⁰ and thus actions based in battery and assault are available.⁷¹ In some jurisdictions, such cases are also pursued as the torts of outrageousness, intentional infliction of emotional distress, or other less common torts.⁷² Therefore, courts

66. *Id.* at 1820.

67. *Id.*

68. *Id.*

69. *See id.* at 1820 n.109.

70. *See* RESTATEMENT (SECOND) OF TORTS § 892(c) (1982) (providing that the consent of a child is not a defense to rape even if the child was fully competent); *see also* Mugalli v. Ashcroft, 258 F.3d 52, 58 & n.6 (2d Cir. 2001) (finding that a person under the statutory age of eighteen is not capable of consenting); Warrick v. State, 538 N.E.2d 952, 954 (Ind. Ct. App. 1989) (holding that a child is not capable of consenting to sexual acts); 70 AM. JUR. 2D *Seduction* § 68 (1987) (negating consent of child).

71. *See, e.g.*, Sutherland v. Reno, 228 F.3d 171, 177 (2d Cir. 2000); Wilson v. Wilson, 742 F.2d 1004 (6th Cir. 1984); State v. Brown, 602 S.E.2d 392, 397 (S.C. 2004).

72. *See, e.g.*, Doe v. Ensey, 220 F.R.D. 422, 423–24 (M.D. Pa. Mar. 23, 2004) (including claims for assault, battery, negligence, agency, and negligent and intentional infliction of emotional distress); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996) (affirming trial court’s determination allowing claims against church and church counselor for breach of fiduciary duty, negligent hiring and supervision, outrageous conduct,

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

can avoid trying to determine if trust and vulnerability with respect to a perpetrator arose because of religious doctrine or governance.

However, if the family of a child victim seeks recovery from a perpetrator's supervisor or religious institution, questions of doctrine and governance will usually play central roles in the litigation and the same constitutional issues present themselves as with cases involving adult victims. These include the same pressure on churches to conform to governmental reshaping and the same potentially unconstitutional probing. As discussed above,⁷³ churches will incorporate the courts'—and thus the government's—conception of proper institutional religious forms even if all cases involving adult victims are barred.

Professors Lupu and Tuttle argue that “the public interest in protecting children vastly outweighs any claim of religious privilege.”⁷⁴ Although for many purposes the law has drawn an arbitrary line at age eighteen, it is nonetheless conceptually difficult to distinguish the vulnerability of, and psychological damage to, a seventeen-year-old versus an eighteen-year-old, especially one struggling with substance addictions, a history of sexual exploitation, or a troubled family.

b. Distinction between secular counseling and religious counseling. In cases involving adult victims, Professors Lupu and Tuttle draw further distinctions that are fraught with ambiguities. The first is the line between secular counseling and spiritual counseling. If the abuse arises in the course of secular or professional counseling sessions, Professors Lupu and Tuttle—along with most courts—would find the individual perpetrator liable, even if there were consent to the sexual relationship.⁷⁵ On the other hand, if the sexual relationship arises out of purely spiritual or religious counseling, Professors Lupu and Tuttle propose that the perpetrator should be able to assert

and vicarious liability); *Dolquist v. Heartland Presbytery*, 221 F.R.D. 564 (D. Kan. 2004) (pleading claims for intentional failure to supervise, negligent infliction of emotional distress, outrage, assault, and battery); *Crawford v. Plumm*, No. 03-2155-DJW, 2003 WL 22849183, at *2 (D. Kan. Nov. 24, 2003) (alleging childhood sexual abuse, assault, battery, intentional infliction of emotional distress, and invasion of privacy).

73. *Supra* notes 37–38 and accompanying text.

74. Lupu & Tuttle, *supra* note 1, at 1820.

75. *See id.* at 1820–22.

ecclesiastical immunity.⁷⁶ Thus, this distinction between spiritual and secular becomes critical.

I am more than willing to concede that a person who is trained and licensed as a psychotherapist—and who receives payment from the patient for counseling—should be liable for having sex with his patient, even if there were consent, whether or not the therapist is also a member of the clergy. This liability arises from the application of the professional rules governing licensed psychotherapists⁷⁷ and from some state statutes.⁷⁸

But Professors Lupu and Tuttle do not draw this sharp of a line. Initially, they suggest several characteristics of truly “secular” counseling.⁷⁹ I will call this List One. List One includes such considerations as (1) using secular professional techniques, (2) holding oneself out as a secular counselor, (3) publicly advertising, (4) performing counseling in clinical settings, and (5) receiving payment, by persons who (a) have undergone secular training and licensure and (b) are qualified as counselors in a secular sense.⁸⁰ Although I would draw the line at licensure, the tests in List One are simple, fairly mechanical in application, and generally effective in targeting cases in which liability is appropriate, notwithstanding the possible ambiguity in defining some of the terms in this list such as “qualified,” “advertising,” and “clinical settings.” So far, so good.

76. *See id.* at 1821 (“[C]lergy-specific triggers of liability offend constitutional norms against disfavoring religion.”).

77. *See* AM. PSYCHOLOGICAL ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT §§ 3.05, 10.05, 10.07–.08 (2002), *available at* <http://www.apa.org/ethics/code2002.html> (last visited Dec. 2, 2004), *applied in* *Elliott v. N.C. Psychology Bd.*, 485 S.E.2d 882 (N.C. App. 1997); *Roe v. Jefferson*, No. 01-A-01-9212-CV-476, 1993 Tenn. App. LEXIS 288 (Apr. 16, 1993). The professional standards of the American Association of Pastoral Counselors assert a similar standard:

All forms of sexual behavior or harassment with clients are unethical, even when a client invites or consents to such behavior or involvement. Sexual behavior is defined as, but not limited to, all forms of overt and covert seductive speech, gestures, and behavior as well as physical contact of a sexual nature; harassment is defined as but not limited to, repeated comments, gestures or physical contacts of a sexual nature.

AM. ASS’N OF PASTORAL COUNSELORS, CODE OF ETHICS, princ. III(g) (amended Apr. 28, 1994), *at* <http://www.aapc.org/ethics.htm> (last visited Dec. 2, 2004).

78. *See, e.g.*, MINN. STAT. § 148A.03 (2003); Sexual Exploitation in Psychotherapy, Professional Health Services, and Professional Mental Health Services Act, 740 ILL. COMP. STAT. 140/1 (1997); N.C. GEN. STAT. § 90-21.41 (2004).

79. *See* Lupu & Tuttle, *supra* note 1, at 1821–22.

80. *See id.* at 1822–23.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

However, Professors Lupu and Tuttle go further in acknowledging that liability may follow a sexual relationship “when the affair does not arise out of secular therapeutic counseling.”⁸¹ The factors they suggest here I refer to as List Two.⁸² List Two includes (1) holding a regular course of counseling sessions, (2) generating information giving the counselor reason to know of the recipient’s special circumstances of vulnerability, and (3) addressing “personal, as opposed to entirely spiritual, matters.”⁸³ The criteria in List Two are far too broad and may risk encompassing almost all counseling between a church member and her minister.

As to the first test in List Two (regular course of visits), if one is struggling with a profound or ongoing religious or personal problem, it is not unlikely that visits to the pastor may be fairly regular over a period of time. Many persons who seek advice and comfort from a religious leader do so more than once. Therefore, nearly any significant counseling from a priest would meet this first requirement.

The second test (knowledge of vulnerability) is far too broad. Why would a person seek extended counseling with a cleric, who is not otherwise a friend or co-worker, unless she is struggling with some personal challenges? A member of a church might want to explore the nuances of rabbinical law, the oneness of the Christian godhead, or the implications of an existence before earth life. As fascinating as those discussions may be, few of them go on for session after session in a small, intimate setting of two. Discussions of whether to join or stay in a particular church may be largely spiritual, although the relative benefits of church activity to one’s personal life and relationships are likely to arise at some point. A woman who wishes to pursue litigation against a pastor and church will be motivated to describe her situation as vulnerable because of family stress, depression, substance abuse, and any number of vulnerabilities for which psychological testimony may be obtained.

The third test (personal as opposed to entirely spiritual matters) is particularly problematic, as there is no clear separation of professional or secular from “entirely spiritual” counseling. Any distinction that does exist collapses when these two types of

81. *Id.* at 1829.

82. *See id.* at 1831–32.

83. *Id.* at 1832.

counseling are interwoven in a single counseling session. The kind of professional counseling Professors Lupu and Tuttle refer to as secular is frequently one component mixed in with other kinds of relationships. For instance, Professors Lupu and Tuttle acknowledge that medical doctors are held liable for breach of fiduciary duty when they engage in sex with a client after they have begun to offer “therapeutic counseling.”⁸⁴ Professors Lupu and Tuttle cite *McCracken v. Walls-Kaufman*,⁸⁵ in which the court stated it would allow liability when a chiropractor gives “counsel or advice . . . similar to that usually given by psychologists.”⁸⁶ Presumably, the health care providers in such cases also continue to render medical services, so that the therapeutic counseling is just one aspect of the relationship.

With other kinds of professionals, as with doctors, the main purpose of a relationship can become laced with the kind of ancillary sharing of personal information and obtaining of advice that is common to secular counseling. For instance, I assume most professionally trained psychotherapists, who are also clergy, offer some religious counseling and some traditional secular therapy. Presumably most clergy do not sharply separate the spiritual from the temporal and would not be in the business of professional counseling at all if there were no spiritual or religious component permitted. Members of the American Association of Pastoral Counselors, for instance, pledge to adhere to the concept that effective therapeutic services combine theology with the behavioral sciences.⁸⁷

On the other side of the coin, I assume that most religious advisors who are not trained as psychotherapists offer some spiritual counseling and some of the same kind of personal and relationship advice that professional therapists offer. This interweaving of secular and religious counseling seems analogous to medical doctors who provide personal advice. The kind of sharing of information and obtaining of advice that underlies transference may arise when the spiritual slips toward the personal and relationship issues.

Professors Lupu and Tuttle cite *Nally v. Grace Community Church of the Valley*, in which the court comments that a clergy-

84. *See id.* at 1831.

85. 717 A.2d 346 (D.C. 1998).

86. *Id.* at 353; *see also* Lupu & Tuttle, *supra* note 1, at 1831.

87. *See* American Association of Pastoral Counselors, Pastoral Counseling: Brief History, at <http://www.aapc.org/history.htm> (last visited Dec. 2, 2004).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

counselor should not be liable if the counseling is spiritual rather than secular.⁸⁸ The distinctions noted by the court are that the church and the pastors (1) did not advertise as competent secular therapists; and (2) offered instead “thickly religious counseling.”⁸⁹ The court explained that the counseling was nonprofessional and the defendants did not present themselves as “anything other than pastoral counselors.”⁹⁰ How “thick” must the mix be? And does “advertising” require billboards and flyers? LDS Family Services does not “advertise” as offering marriage counseling; Church members are referred by Latter-day Saint bishops.⁹¹ Yet no one could effectively argue that the therapists who work at LDS Family Services do not offer traditional secular counseling (although no doubt intermixed with the spiritual dimension).

Furthermore, Professors Lupu and Tuttle take inconsistent stands on the line between professional and religious counseling. In the last section of their paper, they argue that priests ought to be entitled to the same privilege against reporting child sex abuse accorded to lawyers, and that the seeking of legal counsel is comparable to the seeking of spiritual counsel:

[T]he scope of the priest-penitent privilege is appropriately *compared with the scope of attorney-client privilege*. The law currently assures perpetrators of these (and other) crimes that they may safely confide in their lawyers concerning their misdeeds To permit the continuation of the attorney-client privilege for sex offenders while denying a *comparable priest-penitent* privilege for those same offenders is to create a secular advantage, favoring those who seek advice about legal consequences and options over those who seek spiritual advice concerning the same underlying behavior.⁹²

88. 763 P.2d 948, 960–61 (Cal. 1988).

89. Lupu & Tuttle, *supra* note 1, at 1823 (citing *Nally*, 763 P.2d at 950–52).

90. *Nally*, 763 P.2d at 954.

91. See The Church of Jesus Christ of Latter-day Saints, Teach a Welfare Principle or Topic, at <http://providentliving.org/content/list/0,11664,5155-1,00.html> (last visited Dec. 2, 2004); J. Richard Clarke, *Ministering to Needs Through LDS Social Services*, ENSIGN, May 1977, at 85, 89 (“The purpose or mission of LDS Social [now Family] Services is to assist priesthood leaders by providing quality *licensed* and *clinical* services to members of the Church.”).

92. Lupu & Tuttle, *supra* note 1, at 1892 (emphasis added) (citation omitted).

They further argue that “victims of or witnesses to crimes of sexual abuse should also have the same right to seek spiritual or legal counsel, without fear of *professional* betrayal.”⁹³ This statement assumes that spiritual counseling is a “professional” function and that the recipient of such counseling trusts spiritual counselors in the same way as she might trust legal counselors.⁹⁴

If the division of secular from spiritual counseling is specious, a much broader grouping of claims against clergy for abuse of adults will result in liability under Professors Lupu and Tuttle’s analysis. The only clearly excluded cases are those in which (1) only pure theology or church membership is discussed, and (2) the relationship does not involve personal counseling. Noncounseling relationships, such as purely social and casual interactions with clergy, are less likely to give rise to sexual abuse because the parties are less likely to be alone and less likely to be revealing personal information. Cases in which the priest and parishioner are involved solely in planning a social or organizing a choir would presumably survive under the exemption from liability argued by Professors Lupu and Tuttle.

2. *Flawed comparisons in noncounseling fiduciary duties*

A second basis for finding clergy liable discussed by Professors Lupu and Tuttle is fiduciary duty. Even if a priest is not involved in counseling, some plaintiffs claim that he should be liable because sexual contact is a breach of fiduciary duty. Professors Lupu and Tuttle argue that, without evidence of the nature of the religious

93. *Id.* at 1893 (emphasis added).

94. Another risk of equating clergy with lawyers is institutional liability. Courts regularly hold entire law firms liable for breach of fiduciary duty, although some law firms surely exceed in size the practicing clergy of most churches. See Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 GEO. J. LEGAL ETHICS 413, 467 (1996) (noting the liability of a law firm is the same as the liability of a partner). Liability is based on the notion that lawyers share files and confidences about their clients’ cases and that they share an interest in the outcome of the client’s case. See Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Life*, 28 LAW & SOC. INQUIRY 87, 107–08 (2003). “Lawyers in a firm . . . in fact normally function more or less as a single unit. They consult each other, have access to each other’s files, overhear conversations with clients, and have a mutual financial interest in their clients’ cases.” GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 324–25 (1990). The shared interest in the client’s case is partly financial but can also be a matter of prestige, publicity, and other benefits of a good outcome. Efforts to draw comparisons between clergy and lawyers risk increasing the threat of liability of clergy and at some point equating churches with law firms.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

relationship, clergy cannot be characterized as the kind of fiduciary who is liable for sexual relations with a parishioner.⁹⁵ Indeed, in some contexts, the existence of a fiduciary relation for other purposes does not always make sexual relations a tort. As support, Professors Lupu and Tuttle note that sex between a “stockbroker and client or a trustee and beneficiary creates no greater legal liability than that between any two adult strangers.”⁹⁶

The comparison of clergy as fiduciaries to stockbrokers and the like is not the most apt. Ultimately, we may agree that clergy cannot be designated as fiduciaries without examining the religious implications of their role. But if we assume that clergy are fiduciaries of some kind, as Professors Lupu and Tuttle do in making this argument, clergy cannot be shielded from liability based on the comparison to financial trustees.

Most formal fiduciary duties are based on the entrustment of property such as money or land.⁹⁷ But in other cases, the “critical resource” entrusted is “something valued by the beneficiary but not ordinarily considered property—for example, the confidential information shared by a client with an attorney.”⁹⁸ With property-based fiduciary relations, breach consists of misuse of the property. With a physician, the breach of fiduciary duty may be misuse of access to the body, either directly, as in improper touching in the office, or indirectly, as in misprescribing medication.⁹⁹ With information-based and access-based fiduciary relations, breach

95. See Lupu & Tuttle, *supra* note 1, at 1828.

96. *Id.* at 1829.

97. See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1404 (2002).

98. *Id.* (footnote omitted).

99. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (“[A] physician’s failure to disclose . . . interests [conflicting with the interests of the patient] may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty.”); *Shadrick v. Coker*, 963 S.W.2d 726, 736 (Tenn. 1998) (“[P]atients submit themselves to the skills and art, proficiency and expertise, of hospital personnel . . . [because] frequently, they have no real choice in the matter; they are physically and intellectually unable to do much more than submit and rely upon the medical superiority and ethical propriety of their attendants.” (quoting 54 C.J.S. *Limitations to Actions* § 90 (1987))); Joel Slawotsky, *The Learned Intermediary Doctrine: The Employer as Intermediary*, 30 TORTS & INS. L.J. 1059, 1061 (1995) (“[A] doctor has a fiduciary duty to the patient. . . . [in] evaluating the patient’s needs, assessing the risks and benefits of available drugs, prescribing one, and supervising its use.” (quoting *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87, 91 (2d Cir. 1980))).

consists of the misuse of the information and the power to withhold access.

With religious leaders, one kind of “critical resource” that may be entrusted is personal information; another may be the willingness to recognize the cleric as acting for the religion (or for God) or as having power to grant or withhold benefits of religious access. That information and power may be misused in the sense that the pastor uses them to get inside the head of the parishioner for purposes of seduction. Perhaps what is entrusted to the cleric can be more accurately characterized as intimacy: sharing personal information, self-exposure, and openness to direction and guidance. Initiating and maintaining sexual relations would constitute an abuse of intimacy. So, the fact that sex with one’s real estate agent or stockbroker is not actionable is not particularly compelling in the clergy context. The fact that stockbrokers are liable for misusing a client’s funds, but not for sexual relationships, does not translate to immunizing clergy for sexual relationships.

A more helpful comparison, perhaps, is the comparison Professors Lupu and Tuttle make elsewhere between clergy and lawyers.¹⁰⁰ Although the American Bar Association has adopted a Model Rule covering sex with clients,¹⁰¹ attorneys are subject to professional discipline for having sexual relations with a client only if the relevant state also has adopted the rule.¹⁰² Moreover, violation of a Model Professional Rule is not necessarily grounds for a civil cause of action.¹⁰³ Where a state has no per se rule, courts look at the characteristics of the client in terms of vulnerability and the words, promises, and threats that passed between a lawyer and a client with

100. See Lupu & Tuttle, *supra* note 1, at 1800.

101. See MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2002) (“A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”).

102. As of 1998, “[t]en states have adopted an express rule prohibiting attorney-client sexual relations.” Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131, 137 (1998). These states are California, Florida, Iowa, Minnesota, New York, North Carolina, Oregon, West Virginia, Wisconsin, and Utah. *Id.* at 137–48. Other states have “applied other rules of conduct to prohibit attorney-client sexual relations” without actually expressly prohibiting such relationships in the states’ rules of professional conduct. *Id.* at 148. These states include Colorado, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, South Dakota, and Texas. *Id.* at 149–64; see also Am. Bar Ass’n, *Ethics 2000 Review Status Chart*, at <http://www.abanet.org/cpr/links.html> (last visited Dec. 2, 2004).

103. See MODEL RULES OF PROF’L CONDUCT pmbL., para. 20.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

whom the lawyer had a sexual relationship to determine whether the sexual conduct gives rise to liability.¹⁰⁴ For instance, in one New Hampshire case, the attorney was found liable where he knew that his client “suffered from emotional problems and that she was seeing a psychiatrist.”¹⁰⁵ A court in Colorado ruled that a client’s pending divorce made her “particularly vulnerable at the time of his misconduct, which is also an aggravating factor.”¹⁰⁶ An Indiana court referred to the vulnerability of clients who are “troubled or emotionally fragile.”¹⁰⁷

The liability shield for clergy argued by Professors Lupu and Tuttle, then, erodes when the comparison is made, as is appropriate, between lawyers and clergy, rather than between stockbrokers and clergy. What the comparison to lawyers suggests is that the lawyer—and thus the cleric—as a fiduciary, may be liable for engaging in sex with a client based on evidence of the client’s unique vulnerabilities and the actual conversations between the parties. This inquiry into the characteristics of the congregant and the actual words exchanged between them arguably does not require the constitutionally improper judicial determination of the “‘true’ theological meaning of a clergy-congregant relationship” feared by Professors Lupu and Tuttle.¹⁰⁸ It follows then that another tenet of Professors Lupu and Tuttle’s scheme of constitutional immunity falters with the unraveling of the comparison between clergy and property-based fiduciaries.

104. *See, e.g.*, *People v. Zeilinger*, 814 P.2d 808, 809 (Colo. 1991) (“[A]s a factor in aggravation, we find that the [client] was especially vulnerable at the time [of the sexual relations].”); *Comm. on Prof’l Ethics & Conduct v. Hill*, 436 N.W.2d 57, 58 (Iowa 1989) (finding that an attorney engaging in sex with a client who was unstable violated the attorney’s professional oath to maintain his fitness to represent and to “inspire confidence, respect and trust of his client and the public”); *In re Disciplinary Proceeding Against Heard*, 963 P.2d 818, 821, 825 (Wash. 1998) (“Despite the absence of an express rule banning attorney-client sexual relations, an attorney’s sexual relations with a client can constitute ‘moral turpitude,’ justifying the imposition of disciplinary sanctions,” especially where attorney knew client was vulnerable.); *Musick v. Musick*, 453 S.E.2d 361, 365 (W. Va. 1994) (“The ABA Committee . . . observed that the attorney-client relationship is a fiduciary one and that a lawyer’s fiduciary obligation is heightened if the client is emotionally vulnerable.”). *Cf. In re DeFrancesch*, 877 So. 2d 71 (La. 2004) (suspending an attorney for a violation of conflict of interest, fiduciary duty, and public trust in justice where the attorney engaged in consensual sexual relations with a client who was found not especially vulnerable nor threatened).

105. *Drucker’s Case*, 577 A.2d 1198, 1202 (N.H. 1990).

106. *People v. Barr*, 929 P. 2d 1325, 1326 (Colo. 1996).

107. *In re Grimm*, 674 N.E.2d 551, 554 (Ind. 1996).

108. *See* Lupu & Tuttle, *supra* note 1, at 1827.

3. Liability of supervisors and religious institutions

After addressing the liability of individual clerics, Professors Lupu and Tuttle move on to the potential claims against organizations and supervisors. They discuss three possible theories of liability: negligent employment, respondeat superior, and institutional fiduciary duty.¹⁰⁹ With regard to the negligent employment theory, I concur that Professors Lupu and Tuttle's suggestions for applying an "actual knowledge" or reckless disregard approach to these cases is a useful new construct for shielding churches from improper intrusions. Thus, I do not address that theory in detail here. Instead, I focus on respondeat superior and institutional fiduciary duty. I conclude that the exposure of churches and supervisors under these theories may be underestimated by Professors Lupu and Tuttle, and that courts—fueled with increasing antipathy toward churches and heightened awareness of abuse—may move toward broader interpretations of the law. If so, the effectiveness of the normative vision offered by Professors Lupu and Tuttle becomes even more strained.

a. Respondeat superior. Although respondeat superior has not proven to be a very fruitful theory for plaintiffs to date,¹¹⁰ there are indications that courts may be moving toward more liberally applying it against churches. While I, along with Professors Lupu and Tuttle, may not agree with the broad interpretation of agency used by some courts, one must acknowledge that liberal arguments exist and are occasionally adopted, potentially leaving churches exposed. Professors Lupu and Tuttle do not articulate a form of immunity to apply in these cases, other than suggestions on how to determine who the principal is. Thus, if—as some have suggested—vicarious liability is a still-developing field of law,¹¹¹ greater accessibility of judgments using this theory will make the immunity Professors Lupu and Tuttle suggest for other theories less important.

Liability sounding in respondeat superior is dependant on the validity of the underlying tort against the perpetrator clergyman and the willingness of the court to find the employee's actions within the

109. *See id.* at 1834.

110. *See id.* at 1879–80.

111. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 763 (1998).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

scope of his duties for the employer.¹¹² While many courts have historically adopted the position that sexual conduct is outside the scope of employment,¹¹³ a substantial minority of courts have disagreed.¹¹⁴ Professors Lupu and Tuttle recognize that “[t]he

112. A mere agent does not create respondeat superior liability. *See* RESTATEMENT (SECOND) OF AGENCY § 250 (1958). The following factors are to be taken into consideration when determining whether an agency relationship qualifies as a master-servant relationship: extent of control the employer has over the details the actor’s work, whether it is a distinct occupation, whether the actor is under direction of the employer or is without supervision, whether and what skills are required, whether the workman or the employer provides the tools and location required for the work, the length of time of employment, the method of payment (whether on a time basis or per job completed), whether the work is part of the regular business of the employer, the parties’ beliefs about the relationship, and whether the principal is or is not in business. *See id.* § 220. Essentially the line is the same as between an employee and an independent contractor. *See* Lupu & Tuttle, *supra* note 1, at 1883 n.350 (citing INTERNAL REVENUE SERVICE, U.S. DEP’T OF TREASURY, PUB. NO. 15-A, EMPLOYER’S SUPPLEMENTAL TAX GUIDE 5 (2004)); *see also* RESTATEMENT (SECOND) OF AGENCY § 225 (providing that consideration is not necessary to the relationship of master and servant nor principal and agent). For discussion of whether not being paid matters in the case of Latter-day Saint clergy, *see supra* text accompanying notes 68–69.

113. *See, e.g.*, *Milla v. Tamayo*, 232 Cal. Rptr. 685, 690 (Cal. Ct. App. 1986) (finding that a priest’s improper sexual activity with a parishioner was not typical of clergy behavior and not foreseeable and therefore barring a respondeat superior claim), *rev. denied*, 48 Cal. 3d 448 (1987); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1998) (holding that the sexual involvement of a priest is per se outside the scope of employment and therefore barring respondeat superior); *N.H. v. Presbyterian Church*, 998 P.2d 592, 599 & n.30 (Okla. 1999) (noting that in a substantial majority of cases, sexual abuse was found to be outside the scope of employment); *Roman Catholic Diocese v. Grahmann*, 133 S.W.3d 887, 890 (Tex. App. 2004) (“[A]s a matter of law, [the defendant priest] was not acting within the scope of his duties as an employee or priest on behalf of the Diocese when he allegedly sexually molested Doe.”).

114. *See, e.g.*, *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir. 1986) (applying Washington law) (holding that acts of an employee counselor in engaging in sexual conduct with a counselee were within the scope of employment); *Gordon v. Boyles*, 99 P.3d 75, 81 n.20 (Colo. Ct. App. 2004) (“A claim for negligent supervision may arise when an employer knew or should have known that an employee’s conduct would subject third parties to an unreasonable risk of harm.” (citing *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993))); *Gammons v. N.C. Dep’t. of Human Res.*, 472 S.E.2d 722, 726 (N.C. 1996) (stating that vicarious liability arises from supervision and control); *Bray v. Am. Prop. Mgmt. Corp.*, 988 P.2d 933, 935 (Or. Ct. App. 1998) (determining that the focus should not have been on the act that caused the injury but rather on the acts within the scope of employment that led to the acts that caused the injury).

Some courts have held that secular applications of vicarious liability can be used against churches without violating the First Amendment as long as religious procedures or beliefs are not interpreted or weighed. *See, e.g.*, *Moses*, 863 P.2d at 313, 314, 320, 321 (dictum) (allowing a claim of vicarious liability against a diocese for harm to a parishioner based on a sexual relationship between the parishioner and a priest during the course of counseling as long as religious doctrine is not interpreted or weighed); *see also Doe v. Hartz*, 52 F. Supp. 2d 1027, 1074–78 (N.D. Iowa 1999) (allowing a claim of respondeat superior against a church

employer may be liable even when the alleged wrong, such as sexual abuse, occurs outside the scope of the agent's employment but nevertheless is facilitated by the employment relationship."¹¹⁵

Some courts argue that the doctrine of respondeat superior would not be useful if the scope of agency included only those actions that were done solely with the best interests of the employer in mind.¹¹⁶ As one commentator remarked, "[e]mployers rarely employ workers for the purpose of engaging in wrongful acts. Delivery drivers are instructed to drive carefully, yet their negligent, reckless, or even intentionally injurious driving is attributed to their employer."¹¹⁷

Professors Lupu and Tuttle reason that, if a plaintiff argues that sexual abuse "represents a breach of the cleric's fiduciary obligations," then the "plaintiff at least implicitly claims that the

when plaintiff alleges a clergyman's sexual misconduct with a parishioner took place during normal business hours in the course of his normal duties and such conduct was reasonably foreseeable by the church because of the cleric's known history of sexual misconduct); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323 (Colo. 1996) (allowing a minor's vicarious liability tort claims against a church for a pastor's inappropriate touching during a counseling relationship); *Malicki v. Doe*, 814 So. 2d 347, 352, 365 (Fla. 2002) (finding that the Establishment Clause does not bar a cause of action for negligent hiring and supervision by parishioners against a church and archdiocese where parishioners were allegedly sexually assaulted by a priest during the time they were working at church); *Fearing v. Bucher*, 977 P.2d 1163, 1166-69 (Or. 1999) (granting a vicarious liability claim against a diocese because the jury could reasonably infer that a priest's sexual assaults against a minor parishioner were a direct outgrowth of trust engendered in the priest and were committed out of the priest's desire, at least partially and initially, to fulfill his employment duties as youth pastor and priest); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989) (finding that the plaintiff's complaint sufficiently states a claim of vicarious liability against a church because the alleged sexual seduction was an improper performance of pastoral counseling duties). See generally Joseph B. Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R.5th 530, § 3 (2004).

115. Lupu & Tuttle, *supra* note 1, at 1800; see also *id.* at 1881 nn.341-43 (citing *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990); *Mullen v. Horton*, 700 A.2d 1377, 1381 (Conn. 1997); *Nelligan v. Norwich Roman Catholic Diocese*, No. CV0200992185, 2004 Conn. Super. LEXIS 476 (Mar. 5, 2004)). But see Mark E. Chopko, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. Rev. 1089, 1113-14 (finding this expansive view improper and arguing that "[t]he better view is that criminal impulsive and abusive behavior, contrary to religious teaching and law, is not even remotely in the service of the religion.").

116. See, e.g., *Veco v. Rosebrock*, 970 P.2d 906, 924 n.36 (Alaska 1999) (clarifying that the employee's act needs to be motivated "at least to some degree to serve the master's business").

117. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 138 (1995).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

clergyman has put his own desires above his professional responsibilities,”¹¹⁸ and thus acts outside of the scope of agency. However, this argument suggests that any conduct by an employee that is a breach of his duty to his employer is per se outside the scope of employment for vicarious liability purposes. Most employers intend that their employees not commit torts or breaches of contract or other action that gives rise to liability; nonetheless, when the employee does these things, it can be both a breach of the employee’s duty to the employer and a basis for finding the employer liable in respondeat superior.¹¹⁹ While “it is less likely that a willful tort will be properly held to be in the course of employment,”¹²⁰ it is not impossible. The Supreme Court in *Burlington Industries v. Ellerth*¹²¹ acknowledges both that: “The [sexually] harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer”;¹²² but “[t]he concept of scope of employment has not always been construed to require a motive to serve the employer.”¹²³

Some courts adopt an even broader interpretation. They find vicarious liability for employee misconduct by conceptualizing the injurious actions, although not expressly authorized, to be the “culmination” of ordinary and authorized duties¹²⁴ or done “in

118. Lupu & Tuttle, *supra* note 1, at 1880.

119. See *Hurlow v. Managing Partners, Inc.*, 755 N.E.2d 1158, 1161–62 (Ind. Ct. App. 2001) (“[E]ven if an employee ‘violates the employer’s rules, orders, or instructions, or engages in expressly forbidden actions,’ the employer will still be held accountable as long as the employee was acting within the scope of employment.” (quoting *Warner Trucking, Inc. v. Carolina Cas. Ins. Co.*, 686 N.E.2d 102, 105 (Ind. 1997)); *Greene v. St. Paul-Mercury Indem. Co.*, 320 P.2d 311, 314 (Wash. 1958) (“Under the doctrine of respondeat superior, an employer may, under certain circumstances, be held liable for the negligent act of his employee, although such act may be contrary to his instructions.”).

120. W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505 (5th ed. 1984).

121. 524 U.S. 742 (1998). For discussion of this and its companion case, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), see Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495, 519 (2004); Paula J. Dalley, *All in a Day’s Work: Employers’ Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517 (2002). For discussion of vicarious liability for sexual harassment in general, see Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 149 (2003).

122. *Burlington*, 524 U.S. at 757.

123. *Id.*

124. *Laurim v. Swensen*, 977 P.2d 1157, 1160 (Or. 1999) (addressing sexual abuse by a Boy Scout leader).

conjunction” with authorized acts.¹²⁵ Indeed, the Restatement allows vicarious liability for acts where “the servant . . . was aided in accomplishing the tort by the existence of the agency relation.”¹²⁶ Some courts also find vicarious liability if the harmful acts were done in approximately the same time and place as the employment.¹²⁷

Some courts have described the concept of “scope of employment” as targeting acts that are “reasonably foreseen” from the nature of authorized duties.¹²⁸ Recently, the Connecticut Superior Court, in *Nelligan v. Norwich Roman Catholic Diocese*,¹²⁹ declared that because of the revelations of the commonality of clergy abuse in the last nine years, “[t]his court, at least, is not prepared to conclude that an activity which might be undertaken by as many as four percent of an employer’s employees is a clear cut ‘digression from duty’ as a matter of law.”¹³⁰

Professors Lupu and Tuttle offer no clear proposal for protecting churches from vicarious liability based on these arguments if the underlying acts are found to be breaches of fiduciary duty. Their proposals to restrict liability under both negligent employment and direct institutional fiduciary duty may be monumental, but churches need more protection than that offered by Professors Lupu and Tuttle in the area of vicarious liability.

b. Institutional fiduciary duty. Further, Professors Lupu and Tuttle may underestimate the risk of finding an institutional fiduciary duty on the part of religious organizations. They describe institutional fiduciary duty liability as liability based on a failure to investigate, to warn, or to take remedial action in response to allegations of sexual abuse, rather than as liability based on a close,

125. *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir. 1986) (applying Washington state law).

126. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d); *see also Faragher*, 524 U.S. at 802 (concluding that this second half of section 219(2)(d) of the Restatement is not superfluous).

127. *See* RESTATEMENT (SECOND) OF AGENCY § 228(2) (noting that an act is not covered if it is “far beyond the authorized time or space limits” of the servant’s authority).

128. *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, 329 N.W.2d 306, 311 n.3 (Minn. 1983); *see also Gulf, C. & S.F. Ry. Co. v. Cobb*, 45 S.W.2d 323, 326 (Tex. Civ. App. 1931).

129. No. CV0200992185, 2004 Conn. Super. LEXIS 476 (Mar. 5, 2004).

130. *Id.* at *6.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

personal relationship typical of many fiduciary relationships.¹³¹ They indicate that no such liability would be proper in the case of religious organizations, for several reasons. For example, they assert that an individual would have no reason to think that the church looks out for her interest rather than itself, especially if the church is large and bureaucratic.¹³² Professors Lupu and Tuttle also argue that there is no clear counterpart to secular organizations.¹³³

However, an organization, institution, firm, or other entity (no matter how big and bureaucratic) can theoretically have—and be found liable for breaching—a fiduciary duty, just as an organization can be found guilty of a crime.¹³⁴ *Black's Law Dictionary* defines a “fiduciary relationship” as one in which “one person is under a duty to act for the benefit of the other on matters within the scope of the relationship.”¹³⁵ *Black's* then defines “person” as either a human being or an entity.¹³⁶ Of course, any legal entity, other than an individual, can exist only through the conduct of individual officers and members. Consequently, most criminal statutes and fiduciary duty cases target the individuals who are at fault. But conceptually, if an individual with power to act on behalf of the institution commits a breach of fiduciary duty, the institution may become liable. It is not uncommon for courts to find a breach of fiduciary duty by brokers and securities firms,¹³⁷ escrow companies,¹³⁸ and title companies.¹³⁹

131. See Lupu & Tuttle, *supra* note 1, at 1834.

132. See *id.* at 1834–35.

133. See *id.* at 1844.

134. See KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS 1 (3d ed. 2002); see also *N.Y. Cent. & Hudson R.R. v. United States*, 212 U.S. 481 (1909) (determining corporations could be held criminally responsible); *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287 (D. Mass. 1994) (reaffirming that corporations are criminally responsible); ARIZ. REV. STAT. ANN. § 13-305 (West 2001); N.Y. PENAL LAW § 20.20(2)(b) (McKinney 1998). See also other state statutes cited in Laura Russell, Note, *Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse*, 81 WASH. U. L.Q. 885, 903 n.173 (2003).

135. BLACK'S LAW DICTIONARY 640 (7th ed. 1999); see also RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1982).

136. BLACK'S, *supra* note 135, at 1162.

137. See, e.g., *Geman v. SEC*, 334 F.3d 1183 (10th Cir. 2003) (identifying a firm as a fiduciary to customers); *Davis v. Merrill Lynch, Pierce, Fenner, & Smith*, 906 F.2d 1206, 1215 (8th Cir. 1990) (affirming jury instructions stating that the relationship between a licensed broker and its customers is fiduciary); *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817, 819 (6th Cir. 1981) (upholding a lower court's finding of breach of fiduciary duty by a brokerage firm); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 45, 47 (2d Cir.

It is true that most of the kinds of fiduciary duties imposed on entities are established, formal duties. However, in a few cases the formal, historical, statutory limitations on institutional fiduciary duties drift toward informal, recently developed, court-based fiduciary duties. For instance, some courts have found insurance companies to be fiduciaries, although the circumstances creating the duties and the extent of those duties vary widely.¹⁴⁰ However, other

1978), *cert. denied*, 439 U.S. 1039 (1978) (applying federal securities law) (holding a broker as fiduciary to an investor); *Stanton v. Shearson Lehman/Am. Express, Inc.*, 631 F. Supp. 100, 104 (N.D. Ga. 1986) (determining a brokerage firm to have a direct fiduciary duty to a client); *see also* Cheryl Goss Weis, *A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty*, 23 J. CORP. L. 65, 94 (1997) (“[A] firm acting as a fiduciary is required in all cases to ensure that the customer understands when the firm is selling its own securities.” (citing *Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949))).

138. *See, e.g.*, *Delson Lumber Co. v. Wash. Escrow Co.*, 558 P.2d 832, 834 (Wash. Ct. App. 1976) (“An escrow holder occupies a fiduciary relationship to all parties to the escrow and owes the same duty of fidelity that an agent or trustee owes to its principal.” (citation omitted)).

139. *See, e.g.*, *Buffington v. Title Ins. Co. of Minn.*, 546 P.2d 366, 368 (Ariz. Ct. App. 1976) (“[A]n escrow agent acts in a fiduciary capacity and must conduct the affairs with which he is entrusted with scrupulous honesty, skill and diligence.” (citations omitted)); *Colonial Sav. & Loan Ass’n v. Redwood Empire Title Co.*, 46 Cal. Rptr. 16, 18 (Cal. Ct. App. 1965) (“An escrow holder is the agent of all the parties to the escrow at all times prior to performance of the conditions of the escrow; bears a fiduciary relationship to each of them; and owes an obligation to each measured by an application of the ordinary principles of agency.” (citations and internal quotation marks omitted) (quoting *Spaziani v. Millar*, 30 Cal. Rptr. 658, 682 (Cal. Ct. App. 1963))); *Hurst v. Enterprise Title Agency, Inc.*, 809 N.E.2d 689, 697–98 (Ohio Ct. App. 2004) (dictum) (finding an “escrow agent owes parties a fiduciary duty ‘to carry out the terms of the agreement as intended by the parties’” (citation omitted)); *Denaxas v. Sandstone Court of Bellevue L.L.C.*, 63 P.3d 125, 129 (Wash. 2003) (“[T]he escrow agent, as fiduciary to all parties to the escrow ‘must conduct the affairs with which [it] is entrusted with scrupulous honesty, skill, and diligence.’” (second alteration in original) (quoting *Nat’l Bank of Wash. v. Equity Investors*, 506 P.2d 20, 35 (Wash. 1973))).

140. Some courts have held that insurers are per se fiduciaries. *See Fraioli v. Metropolitan Prop. & Cas. Ins. Co.*, 748 A.2d 273, 275 (R.I. 2000) (“[A]n insurance company has a fiduciary obligation to act in the ‘best interests of its insured . . . [and to] refrain from acts that demonstrate greater concern for the insurer’s monetary interest than the financial risk attendant to the insured’s situation.’” (second alteration in the original) (quoting *Asermely v. Allstate Ins. Co.*, 728 A.2d 461, 464 (R.I. 1999))); *McGreevy v. Or. Mut. Ins. Co.*, 904 P.2d 731, 736 (Wash. 1995) (finding that the fiduciary relationship between insurer and insured “exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds’ dependence on their insurers”). Other courts have held that a fiduciary relationship between insurers and their insureds is created only when there is a special relationship that goes beyond ordinary business dealings. *See Parkhill v. Minn. Mut. Life Ins. Co.*, 174 F. Supp. 2d 951, 959 (D. Minn. 2000) (“[T]here is no per se rule precluding the existence of a fiduciary relationship between an insurer and its insureds.” Minnesota requires insured and insurer to have a special relationship beyond ordinary “arm’s length” business

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

courts have found that insurance companies are not per se fiduciaries.¹⁴¹ A few courts have found that the hospital-patient relationship is a fiduciary one.¹⁴² They hold that, although one

dealings where “confidence is reposed on one side and there is resulting superiority and influence on the other.” (citation omitted) (quoting *Stark v. Equitable Life Assurance Co.*, 285 N.W. 466, 470 (Minn. 1939)); cf. *In re Jackson Nat. Life Ins. Co. Premium Litigation*, 107 F. Supp. 2d 841, 863–64 (W.D. Mich. 2000) (“As a general rule in [Ohio and Arizona], the relationship between an insurance company and its insured is not inherently fiduciary in nature.” However, Ohio recognizes a fiduciary relationship “only if both parties understand that a special trust or confidence has been reposed.” While in Arizona “although an insurance company is not a fiduciary to its insured, it may have some duties of a fiduciary nature, such as duties to treat the insured honestly and fairly.” (citations omitted)). Some courts have held that insurers are fiduciaries only with respect to certain, specific responsibilities within their relationship with insureds. See *McLeod v. Continental Ins. Co.*, 573 So. 2d 864, 867–68 (Fla. Dist. Ct. App. 1990) (analyzing the difference between first-party and third-party bad faith actions where the former consists of an adversarial, nonfiduciary relationship between an insured victim of tort and his insurance company claiming benefits under his own policy, i.e., due to tortfeasor’s insolvency, and the latter consists of a fiduciary relationship between an insured tortfeasor and tortfeasor’s insurance company where the complete control that tortfeasor’s insurance company has over litigation and settlement “places an insurance company in a fiduciary relationship with its insured”); *Cash v. State Farm Mut. Auto. Ins. Co.*, 528 S.E.2d 372, 381 (N.C. Ct. App. 2000), *aff’d*, 538 S.E.2d 569 (N.C. 2000) (finding a fiduciary duty to keep an insured informed as to insurance coverage, but not “with respect to settlement of claims”).

141. Several courts have held that insurers are not true fiduciaries, although they may have duties that are akin to duties owed by fiduciaries. See *Love v. Fire Ins. Exch.*, 271 Cal. Rptr. 246, 251–53 (Cal. Ct. App. 1990) (“[T]he insurer’s obligations attendant to its duty of good faith are heightened. . . . Such obligations have been characterized as *akin* to fiduciary-type responsibilities. . . . While these ‘special’ duties are akin to, and often resemble, duties which are also owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, *not* because an insurer *is* a fiduciary.” (citation omitted)); *Powers v. United Servs. Auto Ass’n.*, 979 P.2d 1286, 1288 (Nev. 1999) (“The duty owed by an insurance company to an insured is *fiduciary in nature*. . . . This special relationship exists in part because, as insurers are well aware, consumers contract for insurance to gain protection, peace of mind and security against calamity. . . . An insurer’s duty to its policyholder is . . . ‘akin’ to a fiduciary relationship.”); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 16 P.3d 574, 578 (Wash. 2001) (“A quasi-fiduciary relationship exists between an insurer and its insured. An insurer has an enhanced fiduciary obligation that rises to a level higher than that of mere honesty and lawfulness of purpose. It requires an insurer to deal fairly with an insured, giving equal consideration in all matters to the insured’s interests as well as its own.” (citation omitted)).

142. See, e.g., *Keithley v. St. Joseph’s Hosp.*, 698 P.2d 435, 439 (N.M. Ct. App. 1984) (stating that a hospital has a fiduciary duty to disclose medical information to patients); *Shadrick v. Coker*, 963 S.W.2d 726, 736 (Tenn. 1998) (stating that a hospital-patient relationship is fiduciary because patients must “rely upon the medical superiority and ethical propriety of” the hospital personnel (internal quotation marks omitted) (quoting *Garcia v. Presbyterian Hosp. Ctr.*, 593 P.2d 487, 489–90 (N.M. Ct. App. 1979))); *Atienza v. Taub*, 239 Cal. Rptr. 454, 458 n.3 (Cal. Ct. App. 1987) (holding that sexual relations between a doctor and patient during the course of treatment constitutes breach of fiduciary duty only

individual health professional commits the breach, the institution is responsible. In a small number of cases, courts have found other entities that are not per se fiduciaries, such as lenders¹⁴³ or universities,¹⁴⁴ to have fiduciary duties in certain, limited circumstances.

when it is represented or actually is a modality of treatment); *see also* Lupu & Tuttle, *supra* note 1, at 1800 n.34 (citing Scott M. Puglise, Note, “*Calling Dr. Love*: The Physician-Patient Sexual Relationship as Grounds for Medical Malpractice—Society Pays While the Doctor and Patient Play, 14 J.L. & HEALTH 321 (1999/2000) (discussing the malpractice liability of physicians who engage in sexual relationships with patients)); *cf.* Haley v. Medical Disciplinary Bd., 818 P.2d 1062 (Wash. 1991) (finding that a doctor’s sexual relations with a sixteen-year-old patient constituted moral turpitude for breaching trust where patient was extremely vulnerable). *See generally* STEVEN B. BISBING ET AL., SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE 216–19 (1995).

143. *See, e.g.*, Barrett v. Bank of Am., 229 Cal. Rptr. 16, 20 (Cal. Ct. App. 1986) (“The relationship of a bank to depositor is at least quasi-fiduciary.”); Denison State Bank v Madeira, 640 P.2d 1235, 1241 (Kan. 1982) (acknowledging conditions when fiduciary relationship might arise for banks); Dugan v. First Nat’l Bank, 606 P.2d 1009, 1015 (Kan. 1980) (dictum) (“The existence of a fiduciary relationship between a bank and a customer has arisen under unusual circumstances; usually, the bank had dealt directly with the customer regarding the matters involved in the litigation, and the bank had knowledge of the reliance and confidence of the customer; in some instances the bank stood to profit from non-disclosure to the customer.”); Smith v. Saginaw Sav. & Loan Ass’n, 288 N.W.2d 613, 618 (Mich. Ct. App. 1979) (finding a fiduciary relationship between a bank and depositor where the depositor reposed faith, confidence, and trust on the bank and heavily relied on the judgment and advice of the bank); Klein v. First Edina Nat’l Bank, 196 N.W.2d 619, 623 (Minn. 1972) (dictum) (“[W]hen a bank transacts business with a depositor or other customer, it has no special duty to counsel the customer and inform him of every material fact relating to the transaction—including the bank’s motive, if material, for participating in the transaction—unless special circumstances exist, such as where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank so to counsel and inform him.”); *see also* Cecil J. Hunt, II, *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 WAKE FOREST L. REV. 719, 740–741 (1994); Steven C. Koppel et al., *Lenders Beware: New Potential Liability in the Lender-Borrower Relationship*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 281, 281 (1996). *See generally* Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 99 (1992).

144. *See* Johnson v. Schmitz, 119 F. Supp. 2d 90, 97–98 (D. Conn. 2000) (“Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student.” In determining whether a fiduciary relationship exists a court may look at whether the university “represented that it would safeguard its students from faculty misconduct[,] . . . [the university’s] representation of its mission towards graduate students, and whether or not it represented that it would take care of graduate students to the exclusion of all others.”); Schneider v. Plymouth State Coll., 744 A.2d 101, 105 (N.H. 1999) (finding that a postsecondary institution has a fiduciary duty to its students to create a safe environment free of sexual advances by faculty to whom students are vulnerable because a “power differential between faculty and students” exists (citation omitted)).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

Although these loose, expansive applications of fiduciary duty law are largely undisciplined and unwarranted, they do happen. Churches should not be found to have fiduciary duties as institutions because such a broad application of the forever fluid law of fiduciary duties leaves them open to too much risk. This risk is insufficiently addressed by Professors Lupu and Tuttle, who offer no concrete proposal for handling the resulting constitutional concerns. Thus, even if respondeat superior were not available as a cause of action, under the framework proposed by Professors Lupu and Tuttle, a plaintiff might still successfully characterize a claim against a church as a breach of fiduciary duty. The knowledge limitation suggested by Professors Lupu and Tuttle for use in negligent hiring, training, and supervising cases is insufficient to provide adequate ecclesiastical immunity in the breach-of-fiduciary-duty setting.

III. PROFESSORS LUPU AND TUTTLE'S STANDARDS AND THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

Legal arguments suffer in abstraction. Understanding the arguments made by Professors Lupu and Tuttle may be facilitated by applying their standards in a context-specific way. I am naturally most interested in how the law plays out when applied to The Church of Jesus Christ of Latter-day Saints (the "Church"), of which I am a member. In this Part, I work through Professor Lupu and Tuttle's categories and immunities in this context. I conclude that the categories and explanations offered by Professors Lupu and Tuttle are useful, although in some ways insufficient, to tease apart those cases in which liability is proper from those cases in which ecclesiastical immunity would be proper. I argue that the application of the theories of liability discussed by Professors Lupu and Tuttle to the Church raises the specter of a plethora of fact-, context-, and liturgy-specific issues, such as would require the help of an insider to decipher. However, if a court were willing to engage in factual inquiry concerning the organization and principles of the Church, the distinctions described by Professors Lupu and Tuttle are insufficient to protect it from inappropriate and unconstitutional liability.

In Part III, I assume that the victim is an adult female because there is little evidence of sexual abuse of adult males.¹⁴⁵ I also assume

145. *See supra* note 16.

that a case brought by the victim, rather than one brought by her husband under a theory such as alienation of affections, which, by the way, is still a viable claim in Utah.¹⁴⁶ I also assume, as discussed in the next section, that all Latter-day Saint clergy are male.¹⁴⁷

A. *Who Are Latter-day Saint Clergy?*

Unlike many other churches, the question of who qualifies as clergy is complex. Virtually every active adult member of the Church has a “calling” to perform some task in furtherance of the Church’s mission, from Sunday school teacher to scoutmaster.¹⁴⁸ It would be unreasonable to consider every one of them clergy for purposes of sexual abuse liability.

Those who hold Church offices, including high-level administrative and authoritative positions, are lay.¹⁴⁹ The vast majority of them have no theological training¹⁵⁰ and hold office for a limited time (many callings are for one to five years) during which they continue to pursue their professional and familial responsibilities.¹⁵¹ Although they are lay, some of them function in many ways similar to the professional clergy in other religions.

146. See, e.g., *Nelson v. Jacobsen*, 669 P.2d 1207, 1215 (Utah 1983) (ruling that an action for alienation of affections is still a viable cause of action in Utah “on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection” (quoting Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME L. REV. 426, 430–31 (1972)); *Jackson v. Righter*, 891 P.2d 1387, 1393 (Utah 1995) (citing *Nelson* favorably on the issue of alienation of affections). Utah is the state with the largest concentration of members of The Church of Jesus Christ of Latter-day Saints.

147. While women also have nonpriesthood administrative callings, such as president of the Young Women’s auxiliary or of the all-female Relief Society, there are few circumstances that might involve a close working relationship between a man and a female leader or co-worker because of gender segregation in most of the auxiliaries.

148. See generally Brian L. Pitcher, *Callings*, in 1 ENCYCLOPEDIA OF MORMONISM 249, 249 (Daniel H. Ludlow et al. eds., 1992) [hereinafter ENCYCLOPEDIA] (“Committed Latter-day Saints accept and fulfill one or more callings at any given time.”).

149. See generally Paul H. Thompson, *Lay Participation and Leadership*, in 2 ENCYCLOPEDIA, *supra* note 148, at 814.

150. See Bruce Douglas Porter, *Church of Jesus Christ of Latter-day Saints, The*, in 1 ENCYCLOPEDIA, *supra* note 148, at 276, 279 (“Formal training is not required for holding positions in the Church, nor is there a ministerial career track of any kind.”).

151. See Don M. Pearson, *Bishop*, in 1 ENCYCLOPEDIA, *supra* note 148, at 117, 117 (“A bishop is a lay minister and receives no monetary compensation for his services. Like other local Church officers, he must maintain himself and his family through normal employment.”); see also Boyd K. Packer, *The Bishop and His Counselors*, ENSIGN, May 1999, at 57, 58 (“The bishopric must have time to make a living and time for their own families.”).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

However, determining which do and which do not function like clergy requires knowledge of the organization of the Church.

All leaders with high-level callings are ordained to the priesthood. However, the concept of clergy with respect to the Church certainly cannot reasonably be deemed to include every person who is ordained to the priesthood. All worthy males age twelve or older may be ordained to the priesthood. Most advance through offices of the priesthood, and at middle-age most adult males who have been active in the Church for some time are ordained high priests.¹⁵² Finding all priesthood holders, or even all high priests, to have potential liability as clergy would place an enormous and unprecedented burden on members of the Church.

While all priesthood holders are given, with ordination, some general responsibilities and privileges to bless and serve, the powers of administration and stewardship over specific members are reserved for those who hold particular “callings.” Only a very few men in any local congregation have responsibilities similar to the clergy in other religions.

The responsible authority for a local congregation, or “ward,” is a bishop.¹⁵³ He reports to a stake president,¹⁵⁴ who has authority over ten or so wards. Stake presidents report to Church general authorities and to those who may be assigned by general authorities to assist with Church work in a particular area. They report to the Quorum of the Twelve Apostles and the First Presidency of the Church, all of whom hold their positions for life. All of these positions entail sufficient authority to qualify their holders as clergy.

152. See A.L. Richards, *High Priest*, in 2 ENCYCLOPEDIA, *supra* note 148, at 587, 587–88 (“As of 1989, there were approximately 246,000 high priests in the Church.”); see also 4 ENCYCLOPEDIA, *supra* note 148, app. 13, at 1756 (reporting 1991 membership numbers equaling 7,762,000); The Church of Jesus Christ of Latter-day Saints, Newsroom “Facts and Figures,” at <http://www.lds.org/newsroom> (last visited Dec. 2, 2004) (showing Church membership as of December 31, 2003, to be 11,985,254). According to these numbers, a current high priest approximation would total 386,571.

153. In small congregations, the presiding officer is a “branch president” rather than a bishop. To avoid confusion, I will use the term “bishop” to include both. Moreover, a bishop has two counselors to which various duties may be delegated, including interviews with members. Rather than create unnecessary complexity, for this paper, I will use the collective term “bishop” as including the bishop and his counselors.

154. Like a bishop, a stake president has two counselors to whom various duties may be delegated, including interviews with members. Rather than create unnecessary complexity, for this paper, I will use the term “stake president” to include the stake president and his counselors.

Most of the religious counseling and personal, one-on-one interaction in the Church involves a member and her bishop or stake president. Bishops hold the positions for approximately five years, stake presidents for approximately ten. Individual members rarely, if ever, interact on a personal basis with anyone higher in the line of authority than his or her stake president. Although members of the Church may, for various personal and administrative purposes, seek advice from and report to other leaders, such as Relief Society presidents and priesthood quorum presidents, these leaders have limited authority and must defer any serious or long-term issue to the appropriate bishop. Thus, bishops, stake presidents, and those authorities to whom they report may be analogized to the clergy of other faiths.

Another category of religious leader that may arguably be considered clergy in the context of the Church is that of missionaries. Even if full-time missionaries may in some sense function like clergy, I argue below that they should rarely be found liable for breach of fiduciary duty or misconduct in counseling.

In Section B, I will first apply Professors Lupu and Tuttle's standards to nonmissionary leaders in the Church and then to full-time missionaries. In Section C, I will consider issues of institutional liability, as raised by Professors Lupu and Tuttle, in the context of The Church of Jesus Christ of Latter-day Saints.

B. Finding Liability Against Alleged Perpetrators in The Church of Jesus Christ of Latter-day Saints

1. Bishops and stake presidents

a. Counseling. With respect to the liability of individual perpetrators, the first issue to address from Professors Lupu and Tuttle's article is the line between secular and spiritual counseling. Professors Lupu and Tuttle admit that clergy engaged in professional, secular counseling should be held liable for breach of a fiduciary duty for having sexual relations with a counselee. On the other hand, they would shield the perpetrator/clergyman if the relationship did not arise in the course of professional or professional-like counseling.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

The most common counseling situations in the Church arise between a member and her bishop or stake president.¹⁵⁵ As is natural with a lay priesthood, a small representative cross-section of the acting bishops and stake presidents are, coincidentally, licensed psychologists, psychiatrists, or therapists by profession.¹⁵⁶ But for the vast majority of bishops and stake presidents—who are not also employed as secular counselors—application of the tests from Professors Lupu and Tuttle’s List One¹⁵⁷ appropriately excludes them from liability. First, if these bishops or stake presidents use “professional techniques,” it is only by chance. Bishops and stake presidents do not hold themselves out as secular counselors nor do they publicly advertise. A particular bishop or stake president may offer to help a member who comes to him with a personal problem, but to the extent a leader solicits visits from members it is not under the guise of offering secular counseling. Moreover, bishops and stake presidents meet with members in the leader’s offices at church buildings, or occasionally at homes, but not in clinical settings. Bishops and stake presidents do not receive pay, either as counselors from the parishioner or as clergy from the Church. Bishops and stake presidents have not undergone secular training and are not qualified as secular counselors. Bishops and stake presidents attend only an

155. The Church of Jesus Christ of Latter-day Saints, like many other religious organizations, sponsors an organization that employs psychologists, psychiatrists, therapists, and social workers. LDS Family Services provides general counseling (which requires membership in the Church and referral from one’s bishop) and adoption services (which do not require Church membership). LDS Family Services counselors must have at least a master’s degree in an area of behavioral science. The most common degree is social work, but some have degrees in marriage and family therapy. *See* The Church of Jesus Christ of Latter-day Saints, Counseling Services, at <http://www.providentliving.org/ses/emotionalhealth/0,12283,2129-1,00.html> (last visited Dec. 2, 2004).

The therapists from LDS Family Services do not concurrently serve as bishops or stake presidents for, or hold any other responsible Church position with stewardship over, the individuals they counsel, although they may hold such a calling in another ward or stake. Thus, they do not act as religious authorities over their patients, although, no doubt, their advice is heavily laced with religious principles. Because the therapists who work for LDS Family Services clearly fit in Professors Lupu and Tuttle’s category of professional counselors for whom liability should follow if they engage in sexual relations with a patient, there is no need to decide if they would also fall within a category of liability for clergy.

156. Some of these professionals attempt to distinguish between their vocation and their church calling by requiring members who require extensive counseling to make paid visits to their offices. But if the member seeking counseling is economically limited, the religious counselor may be reluctant to ask him or her to pay for the necessary counseling.

157. Lupu & Tuttle, *supra* note 1, at 1822.

occasional meeting or a daylong seminar in training for their ecclesiastical calling and are trained by other priesthood leaders, almost none of whom has any training as a secular therapist. Thus, application of the mechanical criteria in List One set out by Professors Lupu and Tuttle would exclude almost all Latter-day Saint leaders from liability for breach of fiduciary duty arising from a counseling situation.

However, the criteria from Professor Lupu and Tuttle's List Two¹⁵⁸ are significantly more troubling. List Two includes three elements: holding a regular course of counseling sessions, addressing personal matters, and generating information that gives the counselor reason to know of special circumstances of vulnerability on the part of the counseling recipient.¹⁵⁹ As mentioned above,¹⁶⁰ this list could be interpreted to include virtually all counseling by clergy in any faith. However, the risk is further increased in the context of The Church of Jesus Christ of Latter-day Saints because of the frequency of interaction with leaders.¹⁶¹ For instance, most active members meet with their bishop at least once a year to discuss their donations.¹⁶² Because Church members are expected to pay ten percent of their increase as tithing, this meeting will reveal to the bishop information about family finances, especially if the member has been unable to meet this commitment because of financial pressures or poor planning. Church members also meet with their bishop and stake president at least once every two years to discuss their worthiness for a recommend allowing them to worship in Church temples¹⁶³ and on other occasions to discuss worthiness for

158. See *supra* text accompanying notes 81–83.

159. See Lupu & Tuttle, *supra* note 1, at 1832.

160. See *supra* text accompanying note 83.

161. See Pearson, *supra* note 151, at 118 (“[The bishop] spends much time visiting with or interviewing ward members. . . . He spends many hours interviewing and counseling youth. . . . Where there is need, the bishop may be involved in counseling on a regular basis.”).

162. See David C. Bradford, *Bishopric*, in 1 ENCYCLOPEDIA, *supra* note 148, at 122, 123 (explaining that bishops receive “an annual, personal report by ward members concerning the donations they have made” to the church).

163. See Kim S. Cameron, *Stake President, Stake Presidency*, in 3 ENCYCLOPEDIA, *supra* note 148, at 1414, 1415 (“Through personal interviews, stake presidencies certify the worthiness of members to enter temples and to be ordained to Melchizedek Priesthood offices, after they have been recommended to the stake president by their bishop.”); see also 2004 CHURCH ALMANAC 7 (Gerry Avant ed., 2004) (“Beginning Nov. 1, 2002, regular temple recommends were valid for two years rather than one year.”).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

other purposes.¹⁶⁴ Inquiries into worthiness are naturally laced with personal information. In addition, if needed, bishops may provide members or families general “counseling on a regular basis.”¹⁶⁵ If a person is vulnerable because of addictions, age, family problems, prior traumatic experiences, guilt, or otherwise, the bishop, and likely the stake president, would know. Thus, an argument could be made—by expansively defining the ambiguous elements of List Two—that every member of the Church who is actively involved is in a counseling relationship with her bishop and stake president that may qualify those leaders for liability in the case of sexual abuse. Presumably, this is not what Professors Lupu and Tuttle would intend. Unfortunately, List Two is not sufficiently restrictive.

b. Noncounseling fiduciary duties. Assuming that the counseling relationship is not sufficient to qualify as professional or professional-like under Professors Lupu and Tuttle’s theory, is there a risk that Latter-day Saint bishops and stake presidents may nonetheless be subject to liability because of the religious nature of their positions? Professors Lupu and Tuttle conclude that courts should not find a fiduciary relationship based on the ecclesiastical relationship in the absence of counseling qualifying under List One or List Two. They argue that such a finding would require inquiry into “profoundly

164. See Linda A. Charney, *Joining the Church*, in 2 ENCYCLOPEDIA, *supra* note 148, at 758, 759 (“In the interview customarily conducted by an authorized Church representative prior to baptism, the interviewer determines the candidate’s willingness and worthiness to enter into the baptismal covenant.”); Dong Sull Choi, *Confession of Sins*, in 1 ENCYCLOPEDIA, *supra* note 148, at 309 (Bishops meet with members who need to confess major sins); Larry C. Farmer, *Interviews*, in 2 ENCYCLOPEDIA, *supra* note 148, at 697, 697 (“Interviews of Church members are conducted to determine personal worthiness, approve participation in religious ceremonies and ordinances, assess needs, issue calls to service, listen to members’ concerns, receive an accounting of performance in a Church assignment, and record a member’s status regarding the payment of tithing.”); Bruce C. Hafen, *Disciplinary Procedures*, in 1 ENCYCLOPEDIA, *supra* note 148, at 385, 386 (Bishops meet with members to hear confessions, to determine worthiness for a temple recommend, to determine “worthiness before recommending persons to serve as full-time missionaries,” and to determine worthiness “before calling officers or teachers to serve in Church organizations, or before a member enrolls at a Church-owned college or university.”); Pearson, *supra* note 151, at 117–18 (Bishops’ responsibilities include interviewing ward members to determine worthiness for participation “in sacred ordinances, to receive the priesthood, to receive calls to serve in the ward and on missions, and to do temple work.”).

165. Pearson, *supra* note 151, at 118.

religious questions”¹⁶⁶ in determining the true “theological” view of the relationship as held by the priest and the parishioner.¹⁶⁷ This section argues that theirs is the proper conclusion for three reasons. The first is how unusual and misunderstood a lay priesthood system is. The second is how administratively difficult and theologically strained it would be to take the necessary steps to protect against lawsuits if broad claims were allowed against Latter-day Saint leaders and the Church as an institution. The third is the extent to which the institutional organization and clergy relations in the Church are perceived differently even by devoted, fully involved Church members, and exploring those perceptions would embroil a court in an unconstitutional role. This section further discusses these three points.

First, I address the significant implications of a lay clergy. Certainly, a Latter-day Saint bishop or stake president is unlikely to be seen as being as “qualified,” in a secular sense, as clergy in other faiths. He has not undergone extensive theological training and may not even hold a college degree. He is in office for only a few years. Before and after his term, a bishop or stake president will hold the same relationship to the Church as most other male members. A member may know him as an ordinary plumber with whom jokes and barbecued chicken have been exchanged. One of my colleagues describes the distinction this way:

[A]re the following situations analogous? (1) You have lived in a neighborhood for twenty years and your friend (your families have vacationed together frequently) [is] called to be a bishop for a five year term. (2) You have attended a church for twenty years and been instructed weekly from the pulpit by the same person, whom you assume will perhaps be your minister forever, or, at least will be a minister until he retires. He does not live near you, and your contact with him has always been minister-congregant specific.¹⁶⁸

Thus, the dynamics of the clergy-member relationship in the Church are tied to both the particularities of a lay priesthood and the

166. Lupu & Tuttle, *supra* note 1, at 1827 (internal quotation marks omitted) (quoting *Richelle L. v. Roman Catholic Archbishop of S.F.*, 130 Cal. Rptr. 2d 601, 618 (Cal. Ct. App. 2003)).

167. *Id.* at 1826–28.

168. E-mail from Scott Cameron, Associate Dean, J. Reuben Clark Law School, Brigham Young University, to Cheryl Preston, Professor of Law, J. Reuben Clark Law School (Feb. 12, 2004) (on file with author).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

ordinariness of one's neighbor in a rotating leadership position that might even be held by one's husband on the next rotation.

Furthermore, even this view is not without its complexity, as demonstrated by the varying points of view of individual Church members. In connection with writing this response, I asked the thirty-four students in my jurisprudence class two questions arising from the first few pages of Professors Lupu and Tuttle's paper: "As compared to clergy from other churches, (1) do LDS leaders consistently disappoint?; and (2) in the last several years, has there been a massive decline in the status of clergy and those who supervise them?" The thirteen responses from Latter-day Saint students fell into three general categories.

The first group responded that they perceive both statements to be as true with respect to Latter-day Saint leaders as with leaders in other religious traditions. The second group saw Latter-day Saint leaders as less likely to be the subject of severe criticism than a leader from a different faith because Latter-day Saint leaders are entirely lay clergy. This group thought that unpaid leaders drawn from the general ranks of membership were more easily seen as fallible and more likely to be forgiven than professional clergy. As one student explained, "a lay clergy lends itself to our being more forgiving and understanding of others' short-comings."¹⁶⁹ Another student pointed out that "[u]sually people know the bishop before [he is] the bishop, so they understand that [he is] human and kind of like them; however, in general a person selected as bishop is well respected and perceived as religious."¹⁷⁰ Thus, the view of the second group suggests that the nature of a rapidly rotating lay clergy is not conducive to arguing that the strong imbalance of power and vulnerability characteristic of a fiduciary duty exists between a member and a priesthood leader in the Church.

The third group of students took a different view of how to compare Latter-day Saint clergy with clergy from other faith-based institutions. One student said, "[t]he [issue] especially is relevant to the LDS Church, but with a twist. LDS Church leaders do not just

169. E-mail from Daniel Swinton, Student, J. Reuben Clark Law School, Brigham Young University, to Cheryl Preston, Professor of Law, J. Reuben Clark Law School (Feb. 4, 2004) (on file with author).

170. E-mail from Wendy Burt, Student, J. Reuben Clark Law School, Brigham Young University, to Cheryl Preston, Professor of Law, J. Reuben Clark Law School (Feb. 4, 2004) (on file with author).

purport to speak in the name of God, they actually do speak in His name by the Spirit and as His duly authorized representatives.”¹⁷¹ Another said,

If a person’s concept of God is that He is actively involved with the management of religion, then it is easier to place trust in a leader because God would not let a leader run amuck. If God is not involved with the management of His church then clergy cannot rely on His support or guidance and we cannot rely on the wisdom of men.¹⁷²

Similarly, “[o]n one hand, one might expect less from [Latter-day Saint clergy], since they are NOT professional men of God, while on the other, one might expect more since the church is lead by the Savior.”¹⁷³

Thus, the perception of Latter-day Saint clergy among Church members of fairly similar age and circumstances is subject to personal variations. Moreover, the views of the third group are intensely tied to theology and a faith-based knowledge, which is certainly not the kind of inquiry a court may appropriately address.¹⁷⁴ In any religion, it makes sense that the faithful will inevitably believe their leaders are more imbued with divine power than in any other religion.

Although there are limited published sources reporting on how Latter-day Saint faithful perceive their relationship with leaders, a 2003 e-mail survey of more than 750 Latter-day Saint women who were actively involved in religious life provides some insights.¹⁷⁵ It reveals that these female members of the Church view their relationship with priesthood leaders in terms similar to the second group of my students. The following comments are particularly

171. E-mail from Joshua Abbott, Student, J. Reuben Clark Law School, Brigham Young University, to Cheryl Preston, Professor of Law, J. Reuben Clark Law School (Feb. 4, 2004) (on file with author).

172. E-mail from Jennifer Higa, Student, J. Reuben Clark Law School, Brigham Young University, to Cheryl Preston, Professor of Law, J. Reuben Clark Law School (Feb. 4, 2004) (on file with author).

173. E-mail from Trevor Hickey, Student, J. Reuben Clark Law School, Brigham Young University, to Cheryl Preston, Professor of Law, J. Reuben Clark Law School (Feb. 4, 2004) (on file with author).

174. See Lupu & Tuttle, *supra* note 1, at 1826–28.

175. See Janiece Johnson, *Patriarchy and Contentment: LDS Women’s Religious Experience, 1970–Present*, in LATTER-DAY SAINT WOMEN IN THE TWENTIETH CENTURY: SUMMER FELLOWS’ PAPERS 93 (2003).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

significant in that they were given by those, who in the Church, do not hold the priesthood and must rely on male priesthood leaders:

A 37-year-old mother in New York confessed that though she has had very few problems with priesthood leaders, in two instances leaders were “more fallible than I would have liked or needed at the time.”¹⁷⁶

For many it is an issue of the differences of individuals. As one 31-year-old in Utah commented, “I have learned that just like there are difficult women in my life, there are also difficult men . . . who happen to hold the priesthood.”¹⁷⁷

A 32-year-old in Texas stated: “I have a testimony of the power they hold, but also realize some times they are very human.”¹⁷⁸

Mentioning an unfortunate experience, a 34-year-old woman in Texas commented, “everybody gets at least one [bad experience with a priesthood leader], I believe, to test their faith . . . [.] Most people are trying to do the best they can and sometimes we disagree on what that is.”¹⁷⁹

Although these women profess support for the Church and the office of priesthood leaders, they do seem particularly attuned to the human fallibility of lay leaders who do not have much training.

The differences in the above comments illustrate the individuality of how people see leaders even within one church. Thus, the voices illustrate the inherent difficulty faced by a court attempting to apply any normative view to a religious relationship. The necessarily fact-specific, individual inquiry would seem to require courts to “resolv[e] questions of religious structure or theological principle,”¹⁸⁰ to “decide between . . . rival understandings.”¹⁸¹ As Professors Lupu and Tuttle explain, “[a] court may no more determine the ‘true’ theological meaning of a clergy-congregant

176. *Id.* at 102.

177. *Id.*

178. *Id.*

179. *Id.*

180. Lupu & Tuttle, *supra* note 1, at 1804; *see also* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. Rev. 1633.

181. Lupu & Tuttle, *supra* note 1, at 1827.

relationship than it may determine the standard of a reasonable cleric.”¹⁸²

2. *Missionaries*

In addition to bishops and stake presidents, another group of Latter-day Saint priesthood holders who have extensive contact with individuals is missionaries. Although once someone joins the Church, primary contact transfers from the missionaries to the bishop and stake president, while investigating the Church, a person’s primary priesthood contact is with missionaries.

As mentioned above, most Latter-day Saint missionaries are males between the ages of nineteen and twenty-one. Other than some basic language and religious training, missionaries have no secular training, no formal qualifications (other than moral worthiness), and no special church authority other than to teach the Church’s message, interview prospective members for baptism, and occasionally preside over small groups of members. Although missionary work is usually a full-time endeavor, missionaries are lay priesthood workers because they are not paid.¹⁸³

Thus, Latter-day Saint missionaries do not engage in secular counseling according to Professors Lupu and Tuttle’s List One: they do not use secular professional techniques, hold themselves out as secular counselors, publicly advertise, meet in clinical settings, or receive payment.¹⁸⁴ Further, they neither have undergone secular training nor are qualified as counselors in a secular sense.

With respect to List Two, of course, the determination is more complex.¹⁸⁵ First, missionaries regularly discuss religion with investigators. This may perhaps qualify as a “regular course” of counseling in the sense that one party is looking to the other for advice, new ways of conceptualizing life, and suggestions for personal change, although not perhaps in the sense of psychological “treatment.”¹⁸⁶ Second, as explained above, no neat division exists

182. *Id.*

183. Missionaries or their families contribute to a Church-wide fund that helps cover missionaries’ living and travel expenses.

184. *See* Lupu & Tuttle, *supra* note 1, at 1821–22.

185. *See id.* at 1832.

186. Professors Lupu and Tuttle do not assume the term “counseling” requires treatment. They refer to “informal counseling between friends” involving “the entrustment of

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

between spiritual and personal counseling.¹⁸⁷ But, as a general matter, it can be assumed that meetings with missionaries are mainly used to discuss doctrine, scriptures, and church principles. Finally, one practical factor may be relevant both to the extent of the personal trust established between a missionary and an investigator and the opportunity to engage in sexual misconduct. Missionaries are strictly required under mission rules to meet with others only in the presence of their missionary companion or another missionary.¹⁸⁸ Thus, counseling that includes extremely intimate details is unlikely, and even then, the information is disclosed to two people. Of course, breaches of mission rules do sometimes happen, but it would be difficult even for a disobedient missionary to get away with one-on-one meetings without a companion for any extended time.

Latter-day Saint missionaries are usually very young, they have little or no formal religious education or training (like that provided in seminaries or university theological courses), and they have almost no authority on their own. Missionaries come in pairs, they frequently rotate, spending only a few months in any given area, and they are under the fairly tight direction of a mission president. Besides, the investigator, prior to baptism, is still an outsider who has other religious options and, in any event, has not chosen a religious bond or subservience to the Church or to these missionaries, even if a court could consider basing a fiduciary duty on the inherent nature of the religious dependency.¹⁸⁹ Thus, I am unconvinced that the typical missionary-investigator relationship is one of fiduciary duty.

confidences and its attendant vulnerabilities,” but explain on other grounds why this counseling does not create liability for sexual conduct. *Id.* at 1828.

187. *See supra* Part I.B.1.b.

188. The one exception to this is the private interview that an investigator is required to have prior to baptism. These one-on-one interviews are conducted by missionaries specially selected by the mission president for leadership positions, and the interviewing missionary’s companion stays just outside the door during the interview.

189. Professors Lupu and Tuttle argue vehemently that it is unconstitutional for courts to find duties based merely on religious behavior or belief, see Lupu & Tuttle, *supra* note 1, at 1826–28, because to do so would single out clergy for more disadvantaged treatment than that accorded others. *Id.* at 1831.

*C. Liability of Latter-day Saint Supervisors and the Church**1. Fiduciary duty*

In addition to claims against individual clerics, Professors Lupu and Tuttle discuss several theories of liability against supervisors and churches. The first kind of claim against nonperpetrators raised by Professors Lupu and Tuttle is a breach of fiduciary duty. Professors Lupu and Tuttle describe this claim as different than the same claim against an individual because “institutional fiduciary claims rarely involve any close, personal connection between organizational leaders and victims of sexual abuse”¹⁹⁰ and because “members of the religious community do not have any legitimate expectations that organizations will respond to assertions of sexual misconduct by clergy with actions taken for the sole benefit of the accuser.”¹⁹¹

With respect to the second point—expectation of undivided loyalty in responding to abuse—the Latter-day Saint context raises another but related issue. Latter-day Saint clergy are “judges in Israel;”¹⁹² thus, a Church member who meets with her bishop or stake president cannot properly view him as a fiduciary that is committed to adopting her viewpoint or meeting her desires. Bishops and stake presidents primarily represent the Church, and no matter how sympathetic and helpful, they are charged with making judgments and taking necessary official Church action, which potentially includes: releasing a member from a calling, asking a member not to take the sacrament or pray in meetings for a period of time, canceling a member’s temple recommend, holding a disciplinary council, or even excommunicating a member.¹⁹³ Latter-

190. *Id.* at 1835.

191. *Id.* at 1836.

192. See Vaughn J. Featherstone, *The Gospel of Jesus Christ Is the Golden Door*, ENSIGN, Jan. 1974, at 82, 82 (“In the 107th section of the Doctrine and Covenants, we read: ‘The office of a bishop is in administering all temporal things;’ and also to be a judge in Israel, ‘to do the business of the church, to sit in judgment upon transgressors’” (citing *Doctrine & Covenants* 107:68, 72)); James A. Cullimore, *Confession and Forsaking: Elements of Genuine Repentance*, ENSIGN, Dec. 1971, at 85, 85 (“A bishop is the father of the ward, the presiding high priest of the ward, and a common judge in Israel. One of the areas in which he sits in judgment is when he must determine one’s worthiness to hold office in the Church, to officiate in Church ordinances, to hold temple recommends, etc.”).

193. See Hafen, *supra* note 164, at 386 (“Because bishops are primarily concerned with the spiritual development of each member, they have wide discretion to make judgments and to give the counsel most likely to assist the member’s spiritual progress and, where needed, the

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

day Saint leaders—who must make these judgments based on unique theological grounds and according to revelation and personal inspiration¹⁹⁴—may or may not consider a woman’s consent to a sexual relation blameless based on her vulnerabilities and power disparities, and any expectation to the contrary is unwarranted.

2. *Negligent employment and supervision*

a. Local leaders. The second cause of action addressed by Professors Lupu and Tuttle is the tort of negligent employment, training, and supervision.¹⁹⁵ Under this theory, a plaintiff must establish that a supervisor or the institution was negligent in hiring, training, and supervising the perpetrator.¹⁹⁶ Further, the nonperpetrators in the organization must have had sufficient knowledge of the risks to give rise to a duty to act.¹⁹⁷ I argue in this section that the administrative burden of a rigid standard of hiring, training, or supervising in the Church would be extreme, that Professors Lupu and Tuttle’s proposal to require actual knowledge would be helpful, but ultimately not enough to provide the Church an appropriate level of protection.

This theory of recovery is less applicable in the Latter-day Saint context in the technical sense, since Latter-day Saint clergy are not paid employees. However, some commentators have interpreted the term “employee” to include volunteers acting as agents and under the control of another entity, regardless of whether actual compensation is paid.¹⁹⁸ I will assume for this section that a

member’s repentance. . . . In the most serious cases, bishops may impose disciplinary sanctions ranging from informal, probationary restrictions to formal proceedings that can result in disfellowshipment or excommunication from the Church.”).

194. See Porter, *supra* note 150, at 278–79 (“[A]ll leaders and members are entitled to divine inspiration within the scope of their responsibilities.”).

195. See Lupu & Tuttle, *supra* note 1, at 1847.

196. See *id.*; see also RESTATEMENT (SECOND) OF AGENCY § 250 (1958).

197. See Lupu & Tuttle, *supra* note 1, at 1867; see also RESTATEMENT (SECOND) OF AGENCY § 228(1)(d) (1958).

198. See RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958) (defining “servant”); see also Jamie Lake, *Screening School Grandparents: Ensuring Continued Safety and Success of School Volunteer Programs*, 8 ELDER L.J. 423, 444–47 (2000) (arguing that a school board can be vicariously liable for misconduct of volunteer where volunteer is considered servant if he acted within scope of his engagement in school and school has control over volunteer through supervision and enforcement of policies). For more examples, see Allan Manley, Annotation, *Liability of Charitable Organization Under Respondeat Superior Doctrine for Tort of Unpaid Volunteer*, 82 A.L.R. 3d 1213 (1978).

volunteer relationship is appropriate for the imposition of a tort relating to hiring, training, and supervising—although I am unconvinced that is a foregone conclusion.

One tremendous problem with supervisory torts in the religious context, according to Professors Lupu and Tuttle, is how a court should determine who has sufficient knowledge or a sufficient duty to investigate, plus the ability to take action to prevent harm.¹⁹⁹ This is certainly true in the Latter-day Saint context. With respect to “hiring,” Latter-day Saint leaders rely on inspiration in the process of calling, ordaining, and investing a bishop or stake president in office, and the process may occur in less than a week.²⁰⁰ Some objectively verifiable safeguards do exist. Most men called to be bishops and stake presidents have been members of the Church for many years. When called, these bishops and stake presidents are presented to the entire congregation for a sustaining vote, and any member of the congregation is free to raise an objection if they know of any reason that the person is not fit for service.²⁰¹ Moreover, if the Church has previously disciplined a man for predatory sexual conduct, he cannot be called to serve as bishop or stake president.²⁰² Nonetheless,

199. See Lupu & Tuttle, *supra* note 1, at 1867.

200. See William G. Dyer, *Leadership Training*, in 2 ENCYCLOPEDIA, *supra* note 148, at 817, 818 (1992) (“Sometimes [a person] is appointed to a position to which he has had no training, as the bishop or stake president follows the impressions of the Spirit in extending calls to service.”); Pearson, *supra* note 151, at 117 (“After prayerful deliberation, the stake presidency proposes a new bishop to the First Presidency and Quorum of the Twelve Apostles. . . . In selecting a bishop, a stake presidency ordinarily considers testimony, judgment, commitment, and charity toward ward members”); Porter, *supra* note 150, at 279 (“[C]allings are believed to be made under divine inspiration.”); Robert E. Quinn, *Common Consent*, 1 ENCYCLOPEDIA, *supra* note 148, at 297, 298 (“Callings to positions of Church service . . . and ordination to the priesthood are made by inspiration of the authorized leaders”).

201. See Cameron, *supra* note 163, at 1415 (“As with all officers in the Church, members of the stake presidency must be sustained by the vote of the members over whom they preside.” (citation omitted)); Pearson, *supra* note 151, at 117 (“The bishop is sustained by a vote of the congregation”); Pitcher, *supra* note 148, at 250 (“[N]o person is to serve in an official calling without the consent of the membership. The sustaining vote is not an election, but signifies that members know of no reason why the individual should be disqualified from service and that they are willing to offer cooperation and support.” (citations omitted)); Quinn, *supra* note 200, at 298 (“Members do not nominate persons to office, but are asked to give their sustaining vote to decisions of presiding councils”).

202. See Gordon B. Hinckley, *Personal Worthiness To Exercise the Priesthood*, ENSIGN, May 2002, at 52, 54 (“Even if a person who abused a child sexually or physically receives Church discipline and is later restored to full fellowship or readmitted by baptism, leaders should not call the person to any position working with children or youth unless [authorized

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

imposing a requirement of “reasonable ordination” would cut deeply into the Latter-day Saint concept of inspiration and would force any reviewing court to delve deeply (and unconstitutionally) into religious doctrine and belief.

With respect to training and supervising, the sheer enormity of the task makes imposing higher standards on the Church in this area unreasonable, and if the Church tried to comply, it would require a substantial restructuring of Church organization and leadership. Because the Church is run worldwide by a lay priesthood, made up of men who must also earn a living and who have limited terms of office, strict supervision is difficult. The number of bishops and stake presidents at any one time is staggering,²⁰³ and the callings rotate rapidly. Given the professed role of inspiration in the Church, the size of the organization, and the lay, short-term nature of leadership positions, a government imposition of “elaborate, expensive, and rigid systems of surveillance”²⁰⁴ would surely violate the Establishment Clause.

Professors Lupu and Tuttle are convincing in their assessment that the knowledge of one Latter-day Saint leader cannot reasonably be imputed to the Church’s central administration in Salt Lake City.²⁰⁵ After being formally installed in their callings, Latter-day Saint bishops and stake presidents are interviewed on a regular basis.²⁰⁶ But, there is no formal mechanism for obtaining feedback

by] the First Presidency.” (internal quotation marks omitted) (quoting THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CHURCH HANDBOOK OF INSTRUCTIONS, bk. 1, at 157–58 (1998)).

203. See F. Michael Watson, *Statistical Report, 2003*, ENSIGN, May 2004, at 26, 26 (listing 2,624 stakes, each of which has a stake president, and 26,237 wards and branches, each of which has a bishop or branch president, as of December 31, 2003).

204. Lupu & Tuttle, *supra* note 1, at 1869.

205. See *id.* at 1869–71.

206. See R. Wayne Boss, *Priesthood Interview*, in 3 ENCYCLOPEDIA, *supra* note 148, at 1142, 1142–43 (“The Church has developed a system of regularly scheduled priesthood interviews for effective over-seeing of delegated responsibilities The priesthood interview is widely used as an administrative procedure between levels of Church organization and assists Church leaders” to organize assignments and receive stewardship reports.); Dyer, *supra* note 148, at 818 (“A leader may confer with his or her own priesthood leader about a problem or need, especially in one’s “stewardship review”—a one-on-one session with one’s organizational leader. These personal interviews are customarily held four times a year.”); Farmer, *supra* note 164, at 697–98 (“Interviews of Church members are conducted to . . . receive an accounting of performance in a Church assignment Members in any calling report on their performance and provide their supervisors with nonconfidential information concerning those they are called to serve.”); see also CONTEMPORARY MORMONISM SOCIAL SCIENCE

from members or for fielding reports about the conduct of a leader, although this certainly happens informally. Professors Lupu and Tuttle are acutely aware of this kind of administrative burden. They suggest importing the requirement of “actual malice”—knowing falsehood or reckless disregard—from the freedom of the press cases to provide a baseline for finding liability.²⁰⁷ They acknowledge that any broader basis for liability “would require expensive and sweeping precautions.”²⁰⁸ Therefore, Professors Lupu and Tuttle’s proposed “alternative approach”²⁰⁹ based on the freedom of the press cases, and their supporting arguments, are extremely appealing in the Latter-day Saint context, and would provide a substantial degree of protection with respect to supervisory torts.

b. Missionaries. With respect to Latter-day Saint missionaries, the administrative burden of supervision is in some sense is both more and less onerous than with nonmissionary leaders. At any one time, there are upwards of 60,000 young Latter-day Saint missionaries in full time service all over the world.²¹⁰ Most full-time missionaries begin their service as missionaries at age nineteen or in their early twenties. Most serve for two years, during which time many of them must also learn a foreign language. The ratio of time devoted to training versus time in service must be considered. Although for each mission there is a full-time older mission president, he is responsible on average for 184 missionaries,²¹¹ who may be stationed many hours’ travel away. These all make for difficulties in supervision.

On the other hand, missionaries are subject to strict rules, and are required to report, have regular interviews with the mission president, and must constantly be with an assigned companion. Missionaries are also expected to report any improper behavior by their companions. These factors may suggest that supervision of missionaries is perhaps slightly easier than supervision of bishops, but these factors are more than trumped by the colossal number of missionaries, their age and inexperience, and the time restraints

PERSPECTIVES 166 (Marie Cornwall et al. eds., 1994) (“Each missionary is regularly interviewed, evaluated, and counseled by mission officials.”).

207. See Lupu & Tuttle, *supra* note 1, at 1861–63.

208. *Id.* at 1863.

209. *Id.* at 1858.

210. See Thomas S. Monson, *They Pray and They Go*, ENSIGN, May 2002, at 49, 50.

211. See 2004 CHURCH ALMANAC 414–38 (Gerry Avant ed., 2004).

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

during which many must learn a foreign language as well as meet their missionary obligations. If courts were to impose broad supervisory duties, the Church would have to face the risks of liability or reexamine its theological commitment to worldwide missionary work.²¹²

3. *Respondeat superior*

The third kind of liability for the institution discussed by Professors Lupu and Tuttle is respondeat superior. Initially, application of respondeat superior seems unsuitable for application in the Latter-day Saint context. Professors Lupu and Tuttle suggest that courts determine the appropriate principal by using the five factors from *J.M. v. Minnesota District Council of the Assemblies of God*,²¹³ including a determination of the “mode of payment.”²¹⁴ Further, they suggest that courts can avoid constitutionally sensitive determinations by simply deciding, based on IRS standards, whether the wrongdoer is an employee or an independent contractor.²¹⁵ Priesthood leaders are not paid, and are not employees, and therefore cannot be easily linked to a principal. So the suggestions offered by Professors Lupu and Tuttle to avoid constitutional entanglements for purposes of determining a principal do not translate well into the Latter-day Saint context.

D. *Insufficiency of the Shield*

I discuss in this Section particular issues that arise when considering the various legal theories and suggestions discussed in *Sexual Misconduct* in the context of The Church of Jesus Christ of Latter-day Saints. Some of Professors Lupu and Tuttle’s recommendations for a more constitutionally sensitive approach to clergy abuse cases are very helpful. One example is the standards they describe in List One for dividing secular counseling from purely

212. “Encumbering them, however, with special duties of loyalty to their adherents, who may number in the many millions and be spread across the globe, inevitably involves either a rearrangement in their structure, policy, or practice of relations with clergy, or, if they are unwilling to so rearrange under the pressures of tort law, a system of fines upon them for continuing to rely on structures of authority inadequate to control clergy who misbehave.” Lupu & Tuttle, *supra* note 1, at 1845.

213. 658 N.W.2d 589, 595 (Minn. Ct. App. 2003).

214. Lupu & Tuttle, *supra* note 1, at 1882.

215. *Id.* at 1883 (citing INTERNAL REVENUE SERVICE, *supra* note 111).

spiritual counseling.²¹⁶ Professors Lupu and Tuttle's analysis of the difficulties of determining standards for reasonable hiring, training, and supervising clergy, and the unconstitutional consequences of allowing court judgments to pressure religions to restructure, seems particularly appropriate in the Latter-day Saint context, as does their prediction that basing fiduciary duty on religious understandings will require inappropriate judicial inquiry into differing understandings among Church members. The meat of Professors Lupu and Tuttle's "Alternative Approach"—the application of restraints from the freedom of the press cases—recognizes and accounts for the difficulties of supervision and the limits in attributing information in an organization such as The Church of Jesus Christ of Latter-day Saints. Professors Lupu and Tuttle's recognition that Latter-day Saint leaders have duties of loyalty other than to the abused member is constructive, in light of the Latter-day Saint clergy's role as judges.

On the other hand, some aspects of their analysis, such as the elements in List Two for determining when nonprofessional counseling ought to give rise to liability,²¹⁷ seem unwisely broad in light of the kinds of counseling common in the Church. More importantly, all of the concerns raised in Part II regarding the sparse and frail nature of the immunity suggested by Professors Lupu and Tuttle in certain areas continue to apply in the Latter-day Saint context, just as they do with respect to other churches.

IV. CONCLUSION

Professors Lupu and Tuttle are sympathetic to the plight of clergy and churches in our litigious society and are firmly committed to the principles behind the Establishment Clause. They acknowledge the jumbled state of the case law in the area of clergy sexual abuse and effectively explain and assess exiting law. Professors Lupu and Tuttle also provide a critique of the appropriateness of each theory of liability in light of constitutional concerns. Then, Professors Lupu and Tuttle seek to articulate a normative compromise position by which to preserve some measure of ecclesiastical immunity in cases where intrusiveness into the domain of religion is most egregious and still permit liability when public policy trumps any claims of religious distinctiveness. This is a

216. See Lupu & Tuttle, *supra* note 1, at 1821–22.

217. *Id.* at 1831–32.

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

laudatory goal, and they may well offer the best that can be expected in the existing legal climate. However, the current social and political trend is vigorously moving toward erasing any vestige of ecclesiastical immunity.²¹⁸ A case for compromise to combat that trend requires an easily workable standard of application with a compelling justification for cases that should qualify for protection.

Although the scheme offered by Professors Lupu and Tuttle presents much that is worthy of recommendation, it also raises some concerns. The first is coverage. With respect to individual perpetrators, for instance, exempting cases involving child victims and cases in which adult victims were in secular counseling relationships leaves a relatively small percentage of cases. I doubt their proposal provides enough protection to matter much in the overall picture of liability of churches and clergy. In addition, some of the characterizations of immunity offered by Professors Lupu and Tuttle are vigorous, specific and imaginative; others are vague cautions that can easily be interpreted and diluted by courts.

The second issue is whether the distinctions Professors Lupu and Tuttle draw in crafting an immunity can withstand erosion. Some of the standards Professors Lupu and Tuttle offer for defining secular counseling permit flexible and expansive applications that may cut deeply into the scope of the immunity. I suggest that the analogies Professors Lupu and Tuttle draw between kinds of fiduciaries is fraught with over- and underinclusiveness that further blur the issues. Furthermore, I remain concerned that courts may be sliding toward overly expansive definitions of scope of authority in vicarious liability law and fiduciary duties of institutions. If this is true, many cases will escape Professors Lupu and Tuttle's scheme of protection in the category of negligent supervision torts.

While I have almost no sympathy for individual perpetrators of sexual exploitation, the consequences of eliminating their immunity may well rain down upon supervisors and churches who were not participants in the abuse. I care very much about this. Courts should indeed be sensitive in these cases to constitutional issues, as Professors Lupu and Tuttle argue, and courts should carefully apply the other restraints so ably argued by Professors Lupu and Tuttle. However, I fear that Professors Lupu and Tuttle's suggestions of

218. *See supra* note 1.

how to be sensitive are too tenuous and vague to offer much protection.

A useful understanding evolves when Professors Lupu and Tuttle's categories and suggestions are applied to The Church of Jesus Christ of Latter-day Saints. Certainly, one of the best points made by Professors Lupu and Tuttle when applied to the Church is the notion that probing the nature of the unique religious experience is beyond the competence of a secular court. The Church rests on fundamentally different principles and practices from many other religions, and even within the Latter-day Saint faithful, some individuals harbor very different perceptions of the role of clergy and the nature of the relationship between clergy and member. Moreover, Professors Lupu and Tuttle's suggestions for limiting the liability of religious institutions for supervisory torts also make excellent practical sense with respect to the Church. If liability attached only if the Church knew or should have known of a particular perpetrator's propensity and took no action, few of these potential cases would survive. The administrative burden of transforming the functions of Latter-day Saint clergy to fit strict requirements of training and information sharing to avoid liability would be nearly impossible. Latter-day Saint leaders are lay leaders with short term appointments all over the world.

More troubling are Professors Lupu and Tuttle's suggestions for when to find a counseling relationship to be a basis for liability, particularly in the context of the regular interviews with Latter-day Saint priesthood leaders characteristic of the Church. Further, any unnecessary fissures in the shield of immunity will inflict a burden on the Church just as they will other religions.

Although perpetrators certainly should not be allowed to continue to sexually victimize adult women, I am deeply concerned about the impact of liability on religious institutions. It is unlikely that courts in this decade will be willing to adopt a full-blown doctrine of ecclesiastical immunity. However, I urge the recognition that commentators and judges must continue to explore the possibilities of a more complete and thorough balance between the demands of tort law and the unique position of religion in our constitutional values. While their goal is admirable and many of their suggestions excellent, Professors Lupu and Tuttle's paper, *Sexual Misconduct and Ecclesiastical Immunity*, does not go far enough to

1945] *Immunity and The Church of Jesus Christ of Latter-day Saints*

develop a concrete, tangible shield to provide churches the protection they deserve.